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In The

Supreme Court of the United States

OCTOBER TERM, 1987

Harry H. Messerlian and
Henry F. Wolkowski,
Petitioners,

-vs-

United States of America,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of
Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

MATTHEW P. BOYLAN, ESQ.
COUNSEL OF RECORD FOR
PETITIONERS
THEODORE V. WELLS, JR.
LOWENSTEIN, SANDLER, KOHL,
FISHER & BOYLAN
A Professional Corporation
65 Livingston Avenue
Roseland, New Jersey 07068
(201) 992-8700

Attorneys for Petitioners,
Harry H. Messerlian
Henry F. Wolkowski

On the Petition
Matthew P. Boylan, Esq.

THE SUPERIOR APPELLATE PRINTING COMPANY
P.O. Box 363
Cranbury, N.J. 08512
Area Code 609
655-1122

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Did the court below err by endorsing the district court's jury charge which failed to properly instruct the jury about the specific intent requirement under *Screws v. United States*, 325 U.S. 91 (1945), where the alleged federal criminal civil rights violation occurs during the course of a lawful arrest?

2. Did the court below err by declining to grant petitioner a new trial based on the government's failure to disclose an expert opinion it had paid for and received from the Chief Medical Examiner of the City of Philadelphia?

3. Did the court below err in upholding the validity of the conspiracy charges in Count Two on the basis of *United States v. Perlstein*, 126 F.2d 789 (3d Cir.), *cert. denied*, 316 U.S. 678 (1942)?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. _____

HARRY H. MESSERLIAN

AND HENRY F. WOLKOWSKI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Petitioners, Harry H. Messerlian and Henry F. Wolkowski, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 4, 1987.

OPINIONS BELOW

The opinion of the United States District Court for the District

of New Jersey, denying post-trial motions, is reported at 633 F. Supp. 1493 (D.N.J. 1986). The opinion of the United States Court of Appeals for the Third Circuit is reported at 832 F.2d 778 (3d Cir. 1987). No opinion was rendered following the denial of a rehearing in banc by the United States Court of Appeals for the Third Circuit. The opinions and judgments are reproduced as appendices A through D.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit denying a rehearing in banc was entered on December 4, 1987. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

FEDERAL STATUTES INVOLVED

Title 18, Section 242, of the United States Code provides:

> Whoever, under color of any law, statute, ordinance, regulation or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the Untied States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

Title 18, Section 371 of the United States Code provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18, Section 1503, of the United States Code provides:

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the

United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Title 18, Section 1623, of the United States Code provides in pertinent part:

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

. . .

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Title 18, Section 3489, of the United States Code, which includes Federal Rule of Criminal Procedure Rule 16 (a)(1)(D), provides:

> Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

STATEMENT OF THE CASE

New Jersey State Troopers Harry H. Messerlian and Henry F. Wolkowski were convicted of charges arising from events which occurred while they were performing their duties as New Jersey State Troopers. Moreover, the government conceded at trial that Messerlian did not intend to kill Topolosky, Brief on Appeal at 3, Appendix at 57a,[1] and that Messerlian was obligated to enter the troop car and subdue Topolosky:

> I want to make absolutely clear to you, and I had mentioned this before, that defendant Messerlian had a right to enter that troop car that night. In fact, he had a duty to enter that troop car that night. Joseph Topolosky had kicked out the rear window of the troop car, and defendant Messerlian had an absolute right to enter that troop car to subdue Joseph Topolosky, to protect other property from

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[1]The Brief on Appeal and Appendix referred to is the Brief to the Third Circuit with a three-volume appendix submitted by petitioners.

being damaged, to prevent possible injury to Joseph Topolosky (Appendix at 399a-400a).

The basis of the charges against Messerlian is that he committed a federal criminal civil rights offense in violation of 18 U.S.C. §242 by fatally hitting Joseph P. Topolosky with a flashlight during the course of lawfully arresting Topolosky. Sergeant Wolkowski was charged with conspiring with Messerlian to "cover up" this alleged assault in violation of 18 U.S.C. §§1503 and 1623.

The evidence at trial shows that Topolosky, accompanied by his young children, had parked his van in the left-hand lane of the New Jersey Turnpike at approximately 10:30 P.M. on Friday, July 31, 1982, outside of Newark and then fallen asleep at the wheel in a drunken state. Shortly after another vehicle collided with Topolosky's van from the rear, Messerlian and his partner arrived at the scene of the accident. The troopers arrested Topolosky for drunk driving, handcuffed his hands behind his back, and placed

him in the rear seat of the troop car. While his partner attended to Topolosky's children, Messerlian began to place flares on the Turnpike to alert other drivers of the existing accident in the left-hand lane. Topolosky, who was now alone in the troop car, began to rock the car, kick with his feet, and he ultimately kicked out the rear door window of the troop car. In response to this disturbance, Messerlian returned to the troop car and, according to the government's theory, hit Topolosky three to four times with a flashlight around the head and neck, causing his death.

There is no question that Messerlian's alleged criminal civil rights offense occurred during the course of a lawful arrest.

Sergeant Wolkowski, a twenty-five year veteran of the New Jersey State Police, was not present on the Turnpike during this incident. His conviction of a single count of conspiring to obstruct justice arises out of events at the Newark Barracks on July 31, 1982 in the hours following the events on the Turnpike. It was the

government's theory at trial, as charged in Count Two of the indictment, that on July 31, 1982, Wolkowski conspired with Messerlian and others to "cover-up" Messerlian's assault of Topolosky from "all comers."

After Sergeant Wolkowski left the Newark Barracks the day following the events on the Turnpike, he had no further participation in the events surrounding Topolosky's death. The only action which the government charges he took in furtherance of the conspiracy after July 31, 1982 is his allegedly perjurious statement to the federal grand jury in 1985-- the very statement which is the basis of the perjury charged in Count Four of the indictment, of which Sergeant Wolkowski was acquitted.

Following an investigation by New Jersey State authorities, Messerlian was indicted in November 1982 for second degree manslaughter by a State grand jury. After receiving additional evidence, however, the State indictment was dismissed. Approximately two years later, in early 1985, the United States

Department of Justice initiated federal grand jury proceedings and on July 25, 1985, the indictment in this case was returned.

The indictment contains six counts which fall into two general categories. Count One charges that Messerlian fatally assaulted Topolosky in violation of the federal criminal civil rights statute, 18 U.S.C. §242. The remaining five counts charge Messerlian, Wolkowski, and two other troopers, George C. Mangione and Brian J. Slattery, with various offenses in connection with their alleged "cover-up" of Messerlian's assault. Count Two this alleges that all four defendants conspired with one another to obstruct justice in violation of 18 U.S.C. §1503. The remaining Counts, Three through Six, individually charge the four defendants with perjury before the federal grand jury in violation of 18 U.S.C. §1623.

The trial lasted approximately three months and the jury deliberated over forty hours over 5 days during which a substantial amount of the trial

testimony was reread to the jury. On July 29, 1986, the jury found Messerlian guilty of the federal civil rights violation, of conspiracy to obstruct justice, and of perjury. Sergeant Wolkowski was convicted of conspiracy to obstruct justice and acquitted of perjury. Troopers George C. Mangione and Brian J. Slattery were acquitted of all charges against them. On May 13, 1986, Messerlian was sentenced to ten years imprisonment on the civil rights offense and three year concurrent terms on the obstruction and perjury counts. Wolkowski was sentenced to a term of one year.

After final judgment of conviction and sentencing, petitioners appealed to the United States Court of Appeals for the Third Circuit as a matter of right pursuant to 28 U.S.C. §1291. On November 5, 1987, the Court of Appeals for the Third Circuit entered an Opinion and Order affirming petitioner's judgments of conviction. 832 F.2d 778 (3d Cir. 1987). Petition for rehearing *in banc* was denied by the Court of Appeals on December 4, 1987.

By Order dated December 21, 1987, the Court of Appeals stayed the entry of the mandate provided that the instant Petition for Certiorari was filed by January 11, 1987.

REASONS FOR GRANTING THE WRIT

I. The Court Below Erred By Endorsing The Court's Jury Charge Which Failed To Properly Instruct The Jury About The Specific Intent Requirement Under *Screws v. United States* Where The Alleged Federal Criminal Civil Rights Violation Occurs During The Course Of A Lawful Arrest

This case squarely presents the fundamental issue of the application of the specific intent requirement established by this Court in *Screws v. United States*, 325 U.S. 91 (1945), to an alleged criminal civil rights violation by a state police officer during the course of a lawful arrest.

In *Screws*, this Court established that the federal crime of violating another's civil rights contains a

state-of-mind requirement.[2] Specifically, this Court held that §242 requires as an essential element the specific intent to deprive another of a constitutional right. Under *Screws*, it is not enough that the defendant does the act which is a constitutional deprivation -- he must specifically intend that his action deprive another of a constitutional right. While the *Screws* Court explained that the defendant need "not have been thinking in constitutional terms," it nevertheless required that this "aim was not to enforce local law but to deprive a citizen of a right... protected by the Constitution." 325 U.S. at 106.

In setting forth the requirements of federal criminal civil rights violations, the *Screws* Court focused on the defendant's intent or purpose, not on the consequence or result of his conduct. Thus, *Screws* requires a nexus

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[2]This Court has also held that this state-of-mind requirement distinguishes §242 from its civil counterpart, 42 U.S.C. §1983. *Monroe v. Pape*, 365 U.S. 167 (1961).

between the defendant's intent or purpose and a constitutional deprivation. As the Court of Appeals for the Fifth Circuit has explained "[t]he implication seems to be evident in the *Screws* case that the statute did not intend to make one a criminal if '*his purpose was unrelated to the disregard of any constitutional guarantee.*'" *Pullen v. United States*, 164 F.2d 756, 759 (5th Cir. 1947) (emphasis in original).

Application of §242 to circumstances where a police officer exercises force during a lawful arrest must then focus on the police officer's intent. If the police officer acts with the intent to perform his duties during the course of a lawful arrest, then his intent is "unrelated to the disregard of any constitutional guarantee," *id.*, and cannot constitute a federal criminal civil rights violation under the requirements established by this Court in *Screws*. In such circumstances, there is no nexus between the officer's intent and the deprivation of a constitutional right.

The criminal civil rights violation which Trooper Messerlian asks this Court to review occurred during the course of a lawful arrest. Moreover, the government concedes that Messerlian was obligated to act to subdue Topolosky during the course of effecting this arrest. Since Messerlian acted with the intent to subdue Topolosky, then any force he used was intended to further a legitimate law enforcement purpose. Excessive force may be a civil tort under 42 U.S.C. § 1983, *Davidson v. O'Lone*, 752 F.2d 817 (3d Cir. 1984) (*in banc*), but it cannot satisfy the higher standard of the criminal sanction of 18 U.S.C. § 242 as enunciated in *Screws*.

The District Court's instructions to the jury were erroneous because they failed to properly instruct the jury about the requirement of specific intent where the alleged federal criminal civil rights violation occurs during the course of a lawful arrest. Throughout the proceedings, the defense contended that the facts alleged by the government established, at best, a state violation of excessive force rather than

a federal violation of §242 because they did not demonstrate that Messerlian had the specific intent to violate Topolosky's constitutional rights. The defense thus requested the District Court to instruct the jury about the requirement of specific intent under §242 and about the distinction between mere excessive force and a federal constitutional violation as follows:

> Under the particular federal statute which is the basis for Count One, every exercise of excessive force or even an illegal assault is not a basis for a charge of a criminal violation. Rather, the government must prove that the defendant acted with specific intent to violate constitutional rights. Accordingly, if you were to find that the defendant may have exercised excessive force but he did not do so with an intent to deprive Joseph Topolosky of a constitutional right then you must return a verdict of not guilty as to this charge (Defendants Request to Charge No. 24, Appendix at 433a).

The defense also requested the District Court to instruct the jury that it must find that:

> ...the defendant utilized excessive force upon Joseph Topolosky with an intent to inflict summary punishment upon him rather than merely out of excessive zeal or over-reacting to the situation (Defendants Request To Charge No. 23(3), Appendix at 432a).

The District Court declined to give either of these requested charges, and thereby permitted the jury to convict Messerlian merely on the basis that he used excessive force.

The circumstances herein present the defendant with a state of mind which negates the specific intent required by §242 as set forth by this Court in *Screws*. In such circumstances, the jury must be specifically and carefully instructed that it is not enough that the defendant acted with excessive force, but that he must have done so with an "aim not to enforce local law but to deprive a citizen of a right ... protected by the Constitution." *See Screws*, 325 U.S. at 106. Here, the jury should have been specifically instructed that it could not convict Messerlian, even if it found

that he used excessive force, if he acted with the intent to subdue Topolosky.

The decision by the Court of Appeals for the Third Circuit fails to address the important issues raised in a §242 case where the defendant is a law enforcement officer engaged in a lawful arrest who is obligated to act and entitled to use force. The Third Circuit's decision upholding Messerlian's conviction also threatens to federalize all excessive force cases involving state law enforcement officers, a result directly contrary to the prior holding of this Court in *Screws*, 325 U.S. at 108-09. The fact that a police officer acts under color of state authority may make his actions cognizable as constitutional violations, but only his state of mind can make him a criminal under §242. Unless this Court acts to strictly enforce this state-of-mind requirement in cases involving police officers acting during the course of a lawful arrest, common law assaults by police officers based on the use of

excessive force will become federal crimes under §242.

The proper standard for judging the use of force by police officers engaged in lawful arrests has long proven difficult for our courts. In the context of 42 U.S.C. §1983, the civil counterpart to §242, the Court of Appeals for the Fourth Circuit, sitting *en banc*, recently held that a jury weighing the use of force by a police officer during a lawful arrest must be instructed to consider whether the force "shocks the conscience" and whether it was applied "maliciously and sadistically for the purpose of causing harm." *Justice v. Dennis*, No. 85-1431 (November 25, 1987) (*en banc*), 56 U.S.L.W. 2326-27 *citing Whitley v. Albers*, 475 U.S. 312 (1986). Such instructions, which were not given in this case, must surely be required in similar circumstances where the police officer is charged not merely with a tort, but with a crime which has as an essential element the additional requirement of specific intent.

This case squarely poses this fundamental and important issue and provides this Court with the opportunity to clearly set forth the requirements for a federal criminal rights violation by a police officer during the course of a lawful arrest.

II. The Court Below Erred By Declining To Grant Petitioners A New Trial Based On The Government's Failure To Disclose An Expert Opinion It Had Paid For And Received From The Chief Medical Examiner Of The City of Philadelphia.

Following the jury's verdict, Doctor Marvin Aronson, the Chief Medical Examiner for the City of Philadelphia, informed the District Court on his own initiative that he had been retained by the government to render an expert opinion as to the cause of Topolosky's death and had provided the government with an opinion which he believed to be favorable to the defense. The Court then held an evidentiary hearing at which Doctor Aronson and Anne Singer, an Assistant United States Attorney,

offered directly contradictory versions of Doctor Aronson's report to A.U.S.A. Singer. Doctor Aronson testified that he told Singer that Topolosky's death resulted from the automobile accident. A.U.S.A. Singer testified that Doctor Aronson told her that Topolosky had died as a result of blows of moderate force, an opinion consistent with that of other expert opinions she had received.

Following this hearing, the District Court issued a lengthy opinion holding that Doctor Aronson "lied" at the hearing, *United States v. Messerlian*, 633 F.Supp. 1493, 1495 (D.N.J. 1986), and that he "did not tell Ms. Singer that he held the opinion that Joseph Topolosky's death was caused by the motor vehicle accident." *Id.* at 1501. With regard to the defendants' motion for a new trial, the District Court found that unlike any expert witness at trial, Doctor Aronson would have testified that he holds an opinion to a reasonable degree of medical certainty that the manner of Topolosky's death was accidental, *id.* at 1507, that Doctor Aronson's testimony was newly

discovered, that the failure to have discovered it earlier was not attributable to the defendants' lack of diligence, *id.* at 1506, and that Doctor Aronson would have been permitted to testify as an expert at trial. *Id.* at 1504. Nevertheless, the District Court denied petitioners' motion for a new trial on the grounds that Doctor Aronson's testimony was "cumulative," *id.* at 1508, and that "a jury would have found Doctor Aronson's opinion to be speculative and abstract." *Id.* at 1510.

Doctor Aronson's opinion could not be cumulative because it was unlike that of any expert witness at the trial. Dr. Aronson would have been the only expert witness to testify to the opinion that Topolosky's death resulted, to a reasonable degree of medical certainty, from the automobile accident. The government's two experts at trial testified that Topololsky's death resulted, to a reasonable degree of medical certainty, from a homicide. The defense's two experts testified that the manner of Topolosky's death was "undetermined" because it could not be said to a

reasonable degree of medical certainty whether it resulted from a homicide, from an accident, from self-inflicted blows, or from natural causes. Doctor Aronson's testimony would have provided the jury with a third alternative--one which to a reasonable degree of medical certainty directly contradicted the government's expert testimony that Topolosky's death was a homicide, and one which directly negated an essential element of the offense, thus requiring an acquittal if accepted by the jury.[3]

The Court's denial of petitioners' motion for a new trial is especially disturbing in light of the nature of the jury's deliberations. The jury deliberated for over forty hours and during its lengthy deliberations it asked for and received for review much of the expert medical testimony. The

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[3]The District Court expressly instructed the jury that it had to find as an essential element of the §242 offense that Messerlian caused Topolosky's death.

question remains and, unless this Court grants the writ and a new trial, will always remain as to whether Doctor Aronson's testimony would have resulted in a different verdict.

A. The Panel Erred In Denying Defendants A New Trial On The Ground That The Government's Failure To Disclose Doctor Aronson's Report Violated Federal Rule Of Criminal Procedure 16.

The following undisputed facts were established at the post-trial hearing concerning the government's failure to disclose Doctor Aronson's expert medical opinion: (1) that the government retained Doctor Aronson to examine official records concerning Topolosky's death and to report his results to the government; (2) that when she retained Doctor Aronson, A.U.S.A. Singer instructed him to provide his initial report orally; (3) that A.U.S.A. Singer received Doctor Aronson's oral report of his results;

(4) that A.U.S.A. Singer then instructed Doctor Aronson not to prepare or submit a written report of his results; (5) that A.U.S.A. Singer did not record or otherwise memorialize in writing Doctor Aronson's report to her; and (6) that the government did not provide Doctor Aronson's report to the defense or even disclose to the defense that it had retained Doctor Aronson and received a report from him until after the jury had reached a verdict (and only then at the instigation of Doctor Aronson himself).

These undisputed facts established that the government violated the mandatory requirement of Federal Rule of Criminal Procedure 16(a)(1)(D) to disclose to the defense "results or reports" of examinations or tests "material" to the defense. The Court of Appeals' rejection of defendants' Rule 16 argument is based on its acceptance of the District Court's opinion that Dr. Aronson's opinion was either cumulative or incredible. 832 F.2d at 796. However, for the reasons described above in connection with defendants' motion for a

new trial, Doctor Aronson's opinion could not be cumulative because it was unlike that of any other expert witness at trial, and it negated an essential element of the offense.

III. The Court Below Erred In Upholding The Validity Of The Conspiracy Charged In Count Two On The Basis Of *United States v. Perlstein*

The decision of the Court below upholding the validity of Count Two, the conspiracy to obstruct justice, rests on its view that *United States v. Perlstein*, 126 F.2d 789 (3d Cir.), *cert. denied*, 316 U.S. 678 (1942) controls this case. This Court should grant the writ because the decision below misapprehends the holding in *Perlstein* and erroneously expands the law concerning conspiracies to obstruct federal proceedings which have not commenced.

In *Perlstein*, the Court of Appeals for the Third Circuit held over a lengthy and vigorous dissent that individuals can conspire to obstruct federal proceedings which have not commenced so long as they agree to

obstruct federal proceedings should they commence and undertake to do so once the federal proceedings have commenced. The Court distinguished a conspiracy to obstruct federal proceedings from the substantive crime of obstruction (which requires the existence of federal proceedings) on the basis that the crime of conspiracy consists of an unlawful agreement. The *Perlstein* Court thus held that there is a sufficient federal nexus to support the crime of conspiracy to obstruct federal proceedings even in the absence of such proceedings so long as the agreement to obstruct is directed at federal proceedings.

The conspiracy charged in *Perlstein* demonstrates that the agreement to obstruct must be directed at federal proceedings. The *Perlstein* conspiracy alleged seven overt acts, five of which occurred after the federal grand jury investigation commenced and involved efforts by the defendants to obstruct the federal proceedings.

By contrast, six of the eight overt acts charged in Count Two of the indictment in this case occurred before

the commencement of any federal proceedings and involved the State Police investigation and the State grand jury. In fact, all of the overt acts which Sergeant Wolkowski is alleged to have committed occurred on July 31, 1982 -- years before any federal proceedings commenced.[4]

The conspiracy charged in this case is not a *Perlstein* conspiracy. The agreement in *Perlstein* was clearly directed at federal proceedings and, as the overt acts alleged demonstrate, the conspirators then undertook to carry out their agreement by actually obstructing a federal proceeding. Here, there is no evidence that Petitioners ever agreed to obstruct or even considered the possibility of federal proceedings at the time of the alleged agreement, and the overt acts alleged demonstrate that the agreement was directed at state proceedings. Thus, unlike *Perlstein*, there was no

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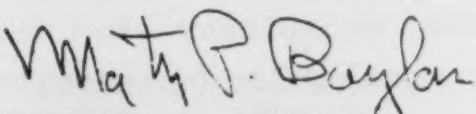
[4]The only exception is the overt act alleging that Wolkowski perjured himself before the Federal Grand Jury, the identical charge of which he was acquitted in Count Four.

federal nexus at the time the alleged conspiratorial agreement was reached and Count Two is nothing more than a charge of conspiracy to obstruct state proceedings which is joined with allegations of perjury before a federal grand jury years later. If *Perlstein* is extended to the conspiracy in this case, the government will be permitted to transform a conspiracy in violation of state law into a conspiracy to violate federal proceedings under §1503 simply by appending allegations of perjury before subsequent federal proceedings to a conspiracy to obstruct state proceedings.

CONCLUSION

For the reasons above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,



MATTHEW P. BOYLAN
Counsel of Record for
Petitioner

THEODORE V. WELLS, JR.
LOWENSTEIN, SANDLER, KOHL,
FISHER & BOYLAN
A Professional Corporation
Attorneys for Petitioners,
Harry H. Messerlian and
Henry F. Wolkowski

Dated: January 8, 1988

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-5323 & 86-5345

UNITED STATES OF AMERICA

v.

MESSERLIAN, HARRY H.,
Appellant in 85-5323

UNITED STATES OF AMERICA

v.

WOLKOWSKI, HENRY F.,
Appellant in 86-5345

On Appeal from the United States
District Court for the District
of New Jersey-Trenton
(D.C. Criminal Nos. 85-00262-01 & 02)

Argued February 9, 1987

Before: HIGGINBOTHAM and STAPLETON,
Circuit Judges,
and CONABOY, District Judge.*

---

*Honorable Richard P. Conoboy, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

(Filed November 5, 1987)

JOSEPH A. HAYDEN, JR., ESQ. (ARGUED)
Hayden & Perle
80 River Street
Hoboken, N.J. 07030

MATTHEW P. BOYLAN, ESQ. (ARGUED)
THEODORE V. WELLS, JR., ESQ.
Lowenstein, Sandler, Kohl, Fisher
& Boylan
65 Livingston Avenue
Roseland, N.J. 07068

Attorneys for Appellants

LISA J. STARK, ESQ. (ARGUED)
United States Department of Justice
Civil Rights Division
10th Street & Constitution Avenue, N.W.
Washington, D.C. 20530
Attorney for Appellee

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., Circuit Judge.

This appeal arises from the convictions and sentences of New Jersey

State Troopers Harry H. Messerlian and Henry F. Wolkowski, in connection with the death of arrestee Joseph P. Topolosky, while in police custody, following a traffic accident on the New Jersey Turnpike in July, 1982. For the reasons set forth below, we will affirm defendants-appellants' convictions and sentences on all counts.

I.

A. PROCEDURAL HISTORY

On July 31, 1982, Joseph P. Topolosky was pronounced dead on arrival at the St. James Hospital in Newark, New Jersey, following his arrest for driving while intoxicated. Shortly thereafter, New Jersey state authorities initiated an investigation into the events that led to Topolosky's death. On November

24, 1982, a state grand jury in Union County, New Jersey, returned a one count indictment that charged Trooper Messerlian with second-degree manslaughter. *See* N.J. Stat. Ann. § 2C: 11-4(b)(1) (West 1982). Following the discovery of new evidence, however, the matter was submitted to a second state grand jury, which voted not to return an indictment against Messerlian. Consequently, the original manslaughter indictment was dismissed on April 28, 1983.

On July 25, 1985, following an investigation by the United States Department of Justice, a federal grand jury returned a multiple count indictment against Messerlian, charging him with violations of 18 U.S.C. § 242

(1982)[1] (deprivation of civil rights), 18 U.S.C. §§ 371 and 1503 (1982)[2] (conspiracy to obstruct justice) and 18

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[1]Section 242, Deprivation of rights under color of law, provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

18 U.S.C. § 242 (1982).

[2]Section 371, Conspiracy to commit offense or to defraud United States, provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than

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U.S.C. § 1623 (1982)[3] (false declarations). The same indictment charged

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$10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 371 (1982).

Section 1503 defines the underlying offense at issue in this appeal. That section, labelled "influencing or injuring officer or juror generally," provides in pertinent part:

> Whoever . . corruptly . . .influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years or both.

18 U.S.C. § 1503 (1982).

[3]Section 1623, False declarations before grand jury or court, provides in pertinent part:

> (a) Whoever under oath . . .in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration . . .shall be fined not more than $10,000 or imprisoned not more than five years, or both.
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> . . . .
>
> (e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of
(Footnote continued on next page.)

appellant Henry F. Wolkowski with conduct in violation of 18 U.S.C. § 371 (conspiracy to obstruct justice) and 18 U.S.C. § 1623 (false declarations). Specifically, the indictment charged that Messerlian, acting under color of law, fatally struck Joseph P. Topolosky and thereby willfully deprived Topolosky of his constitutional right to liberty without due process of law in violation of 18 U.S.C. § 242. The indictment further charged that Messerlian and Wolkowski, together with State Troopers George J. Mangione and Brian Slattery,[4] conspired in violation of 18 U.S.C. § 1503 (1982) to cover up the alleged

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evidence.

18 U.S.C. § 1623 (1982).

[4]Mangione and Slattery were also charged separately with obstruction of justice and making false declarations. See 1 Joint Appendix of Defendants-Appellants Harry H. Messerlian and
(Footnote continued on next page.)

assault and thereby prevent state and federal investigation of the circumstances surrounding Topolosky's death.

Following a three month trial before the Honorable Anne E. Thompson,[5] the jury returned a unanimous verdict of guilty on all counts against Messerlian. Wolkowski was found guilty of conspiring to obstruct justice and not guilty of making false declarations. Subsequently, both appellants filed motions for judgments of acquittal, or alternatively, for new trials. After a hearing, the district court entered an order on April 29, 1986, denying all post-trial motions. On May 13, 1986,

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Henry F. Wolkowski in Support of Briefs on Appeal ("Jt.App.") at 18a-20a. Each was acquitted on all counts.

[5]Honorable Anne E. Thompson, United States District Judge for the District of New Jersey.

the district court sentenced Messerlian to concurrent terms of ten years imprisonment on Count 1, three years imprisonment on Count 2 and three years imprisonment on Count 3. Wolkowski was sentenced to one year imprisonment on his conviction for conspiring to obstruct justice. On May 12, 1986, the district court granted and denied motions by Wolkowski and Messerlian, respectively, for bail pending appeal. On June 16, 1986, this Court vacated the district court's order denying Messerlian bail pending appeal. *United States v. Messerlian*, 793 F.2d 94 (3d Cir. 1986). These appeals followed and were consolidated by order of this Court dated August 13, 1986.

Messerlian advances three principal arguments on appeal. First, Messerlian maintains that the district court failed to instruct the jury

properly on the crucial element of specific intent under section 242. Second, Messerlian argues that Count 2 of the indictment is legally insufficient because it charges appellants with a conspiracy to obstruct federal proceedings that had not commenced at the time the alleged conspiracy was formed. Third, Messerlian contends that the government's failure to disclose exculpatory expert medical opinion requires reversal of his conviction, and that the district court erred in denying his motion for a new trial based on newly discovered evidence. This evidence consisted of the testimony of Dr. Marvin Aronson, Medical Examiner for the City of Philadelphia. *See infra* subsection C.

Appellant Wolkowski joins Messerlian's second and third contentions. In addition, Wolkowski makes two

related arguments regarding his conspiracy conviction. First, Wolkowski argues that the evidence at trial was insufficient to support a reasonable jury verdict that he conspired to obstruct justice. Alternatively, Wolkowski maintains that the district court erred in denying his motion for a new trial because the jury's verdict is against the weight of the evidence and constitutes a miscarriage of justice.[6]

Due to the nature of appellants' arguments, we turn now to a detailed account of the facts as developed at trial.

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[6]We have considered the remaining contention of appellant Wolkowski that the district court erred in denying his motion to be severed from joint trial with Messerlian and find it to be without merit.

B. FACTS

1. The Constitutional Deprivation

On July 30, 1982, between 10:30 and 10:45 p.m., Joseph P. Topolosky parked his van -- occupied by himself and his two children, then ages four and five -- in the left lane of the New Jersey Turnpike. A car driven by Nelson Velazquez collided with the rear of the van when the vehicle immediately in front of the car suddenly swerved to the right. Velazquez and the passengers in his car -- Luis Guzman, Abimael Fontanez and Gloria Ruiz -- got out of the car and went to the van to determine whether its occupants were hurt.

Upon approaching the van, Fontanez observed the driver resting his head on his arm. Fontanez roused Topolosky and asked him if he was all

right. Topolosky raised his head and responded that he was fine. *See* Supplemental Appendix ("SA") at 13. Velazquez smelled alcohol on Topolosky and believed him to be drunk. *Id.* at 232, 260. Velazquez, Fontanez and Guzman observed no cuts, bruises, bleeding or injuries of any kind on Topolosky's face.[7] *Id.* at 13, 232, 264-65. They therefore returned to their car to examine the damage and to wait for the police.

Within ten to twenty minutes, New Jersey State Police Troopers Messerlian and Kenneth McClelland arrived at the scene of the accident. The troopers talked initially with the four occupants of the Velazquez vehicle

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[7]Ruiz testified that she could not remember whether she had actually approached the van to check on its occupants. *See* SA at 70.

and determined that no one was seriously injured. The troopers then approached the van and attempted to wake Topolosky, who appeared to be asleep. After smelling alcohol on Topolosky's breath, Messerlian and McClelland pulled him out of the van, placed him under arrest, cuffed his hands behind his back, escorted him back to the cruiser and placed him in the rear seat. As Topolosky walked to the cruiser, Velazquez, Ruiz, and Fontanez observed that he had no facial injuries. *See* SA at 26, 76, 236.

After placing Topolosky into the cruiser, Trooper McClelland attended to Topolosky's children while Trooper Messerlian began setting flares to alert oncoming traffic to the accident. Thereafter, Topolosky, while lying handcuffed in the back seat of the cruiser, kicked

out the left rear window. *See* SA at 28, 238, 267. In response to this disturbance, Messerlian, according to Velazquez and Fontanez, entered the cruiser and struck Topolosky three or four times on his face and neck with a flashlight. *Id.* at 28,29, 250-53; *see also id.* at 493, 495-96 (testimony of Gary McWhorter). Ruiz testified that she observed Messerlian strike Topolosky in the head but could not identify the object used. *Id.* at 80. She did see a flashlight in Messerlian's hand, however, immediately before he entered the cruiser. *Id.* at 78-79. Guzman testified that he saw Messerlian with "an object, black and long" in his hand, and that his hand was "going up and down" while he was in the back seat of the cruiser. *Id.* at 269-70. Also, Velazquez, Fontanez and Guzman each

testified to hearing the Topolosky children cry out "[d]on't hit my father, don't hit my father." *Id.* at 33, 242, 271.

Following the episode in the cruiser, Messerlian returned to interview the accident victims. During this time, Velazquez, Fontanez and Ruiz each went back to the cruiser, where they saw Topolosky lying motionless in the back seat with blood running from his mouth and face. *See* SA at 34, 881, 241. After completing their interviews, the troopers radioed ahead to the state police barracks, informing the senior trooper that they were returning to the station with a drunk driver. *Id.* at 163. When Messerlian arrived at the

state police barracks,[8] Topolosky's "face was puffy. There was a slight amount of blood on his mouth, and he appeared to be unconscious." *Id.* at 100 (testimony of Sergeant Nicholas Sheyka, acting supervisor, Newark state police barracks, July 30, 1982). Due to the condition of Topolosky, the supervising trooper, Sergeant Sheyka, instructed Messerlian to remove the handcuffs so that Topolosky could be taken to a hospital. Sergeant Sheyka proceeded upstairs to call an ambulance. *Id.* Thereafter, Topolosky was taken to St. James Hospital, where at 12:10 a.m., Dr.

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[8]The record indicates that when Messerlian returned to the barracks he was accompanied by a Trooper Sinckler instead of Trooper McClelland. *See* SA at 97-98. Apparently, Trooper Sinckler arrived on the scene to assist in overseeing the removal of the vehicles. Trooper McClelland, who had been attending to the Topolsky children, left the scene in another police car to escort the children home. *See* SA at 403.

Lawrence Dalglish, the attending physician in the emergency room, pronounced him dead on arrival. *Id.* at 137.

At trial, the "central fact issue was whether Messerlian hit Topolosky with a flashlight and caused his death or whether Topolosky's death was caused by the car accident, or by Topolosky's hitting his head on the car door or some object in the car." Defendant-Appellant Harry H. Messerlian's Brief on Appeal ("Messerlian's Brief on Appeal") at 7. In his examination report, Dr. Dalglish had written: "Pupils dilated, glazed cornea, left eye swollen shut. Blood oozing from mouth, and a marked DOA." SA at 141. At trial, Dr. Dalglish further described Topolosky's external injuries. Specifically, he stated that the left side of Topolosky's face was swollen, bruised

and discolored; his lip was lacerated; his face and nostrils were covered with some blood; the left side of his neck was bruised and swollen; the left eye was surrounded by little hemorrhages; his pupils did not react to light; his blood pressure, pulse and respiration were zero; and his body was lifeless. *See id.* at 137-38, 140-41, 148. Based on these observations, Dr. Dalglish stated his opinion that the injuries to Topolosky's face and neck were consistent with having been beaten with a flashlight. *Id.* at 151-52. He further stated his opinion that those injuries were not self-inflicted. *Id.* at 147.

On July 31, 1982, Dr. Rudolf Platt, Assistant State Medical Examiner for the State of New Jersey, performed the initial autopsy on Topolosky. His

examination revealed swelling, contusions, and lacerations to the left side of the neck and face accompanied by considerable hemorrhage beneath these injuries. *See* SA at 289-90, 295-99. An internal examination of the skull revealed a subarachnoid hematoma[9] at the base of the brain. *Id.* at 295-97, 299-304. Dr. Platt also noted that the left side of the complete upper denture worn by Topolosky was missing. *Id.* at 294. On August 4, 1982, a second autopsy was performed by Doctors Platt and Stefan Epstein. In addition to the earlier findings of Dr. Platt, the second autopsy revealed a fracture of the maxilla, a bone extending from the

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[9]Dr. Platt described a subarachnoid hematoma as an extensive collection of blood in a circumscribed area. *See* SA at 299-300.

lower eyelid down to the gum, on the left side of Topolosky's face. *See id.* at 311-17.

On September 30, 1982, Dr. Charles Hirsh, a forensic neuro-pathologist, dissected and examined Topolosky's brain and similarly concluded that the cause of Topolosky's death was a traumatic subarachnoid hematoma. SA at 357-59. Both Drs. Hirsh and Platt indicated that, in their medical opinion, the manner of Topolosky's death was a homicide, the result of external, blunt blows or impacts to the head and neck. SA at 335, 361-63. In so concluding, each expressly ruled out the possibility that the fatal injuries were the result of natural causes, self-inflicted injury or

the automobile collision.[10] *See id.* at 335-36, 362-65.

In addition to the eyewitness testimony and medical evidence, the

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[10]Among the factors that Drs. Hirsh and Platt considered relevant to their conclusion that the manner of death was a homicide were: (1) that there was no evidence of aneurysm, vascular malformation or other congenital defects, thus ruling out the possibility of natural causes, SA at 305-08, 329, 333, 335, 347, 353-56; (2) that there was no blood in the van or on Topolsky's clothing, *id.* at 321, 363, no objects in the van that may have caused the fatal injuries, *id.* at 320, 322, no injury to Topolsky's children, *id.* at 321, 363, minor damage to the van, *id.* at 363; and that there was blood in the cruiser, Topolsky's denture plate was found in the cruiser, *id.* at 364, and that, although a subarachnoid hemorrhage almost invariably results in immediate loss of consciousness, Topolsky walked from the van to the cruiser, *id.* at 366, thus cumulatively ruling out the possibility that the fatal injuries were sustained in the van or as a result of the collision; and (3) that there was no injury to Topolsky's prominent facial features, like the nose or forehead, which would have resulted from thrashing about in the back seat of the cruiser, *id.* at 326-27, 365, and that, at any rate, thrashing about would not produce injuries consistent with those causing Topolsky's death, *id.* at 330-31, 364, thus ruling out the possibility of death by self-inflicted injury.

government introduced evidence at trial to show that state troopers receive training regarding the impact that blows to particular parts of the body have, and to show that troopers are aware that blows to the neck and face area constitute deadly force. *See* SA at 169-72, 277-78, 281-82. Troopers are instructed to use such force only when a person cannot be controlled by a lesser degree of force or when that person is likely to endanger the life of, or cause serious bodily harm to, another. *Id.* at 280.

In his defense, Messerlian presented testimony by several state troopers that on three prior occasions--in August 1968, March 1978 and September 1979--Topolosky had exhibited violent, self-destructive behavior while

intoxicated and in police custody.[11] Messerlian also presented seven character witnesses from the New Jersey State Police who testified that, during his approximately ten year tenure as a state trooper, Messerlian had a reputation as a quiet, peaceful and non-violent individual. *See* SA at 396-402.

Messerlian's medical evidence consisted of testimony by two medical experts, Dr. Leslie Lukash, Chief Medical Examiner for Nassau County, New York, and Dr. Richard Lindenberg. Each of these witnesses testified that, although he agreed with the government's experts that Topolosky's death was

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[11] On cross-examination, however, the government established that the only documented injury to Topolsky during these three detentions was a bloody nose and that no officer had found it necessary to strike Topolsky during his alleged outbursts in order to subdue him. *See* SA at 371-72, 384, 390-91, 394-95.

caused by a subarachnoid hematoma, it was his opinion that the manner of Topolosky's death could not be conclusively determined. Dr. Lukash opined that Topolosky may have died naturally as the result of a ruptured aneurysm or accidentally as the result of the automobile collision. Dr. Lukash also indicated that some of Topolosky's injuries were consistent with his alleged thrashing about in the back seat of the cruiser. He could not, however, rule out the possibility that the fracture to Topolosky's face was the result of blows with a flashlight. *See* SA at 420-21. Dr. Lindenberg also opined that Topolosky died naturally as the result of a ruptured aneurysm or accidentally from the impact of the collision. Additionally, he noted that

Topolosky might have died from hypertension due to his thrashing about in the cruiser. Finally, Dr. Lindenberg unequivocally maintained that Topolosky's fatal injuries could not have resulted from external blows with a flashlight.[12] *See* SA at 464-65, 474-75, 482.

2. The Conspiracy and Perjury Counts

Count 2 of the indictment charged Messerlian and Wolkowski, along

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[12]Dr. Lindenberg based his conclusion that Topolsky received no blows to the head with a flashlight upon his examination of the injury itself. He found irrelevant to his analysis eyewitness testimony that Messerlian had struck Topolsky around the head and neck. Specifically, although conceding that Topolsky's face injuries could have resulted from trauma, Dr. Lindenberg testified that he "d[id]n't need the testimony neither by the Puerto Ricans nor by anybody else who supposedly observed [the alleged beating] to explain that Topolsky did not receive a blow to the head." SA at 462-63.

with Troopers Slattery and Mangione, *see supra* note 4, with conspiracy to obstruct the due administration of justice. Specifically, the government argued that appellants conspired to prevent all law enforcement agencies from learning that Messerlian had assaulted Topolosky. It charged that the following overt acts occurred in furtherance of the conspiracy: (1) Messerlian, Wolkowski and others "agreed not to report the fact that Messerlian had assaulted Topolosky;" (2) Messerlian, Wolkowski and others "failed to provide routine information" to the hospital concerning the circumstances of Topolosky's death; (3) Wolkowski, Mangione and Slattery knowingly omitted accounts of the alleged assault from statements prepared during interviews with Velazquez, Guzman and Fontanez; (4)

Messerlian and others agreed to fabricate a story attributing Topolosky's death to self-inflicted injury on a K-55 radar unit and a briefcase; (5) Messerlian testified falsely before the second Union County grand jury; (6) Wolkowski, Mangione and Slattery made false declarations before the federal grand jury; and (7) Messerlian falsely testified before the federal grand jury as to whether he had assaulted Topolosky.

At trial the government introduced evidence that, after the hospital notified the Newark state police barracks that Topolosky was dead, Sergeant Wolkowski was called at home almost immediately, and that he arrived at the barracks shortly thereafter to initiate and supervise an internal investigation into the circumstances of Topolosky's death. Additionally, the jury heard

testimony that, on the night of Topolosky's death, Wolkowski was the chief investigative officer at the barracks for approximately four hours. SA at 112-14, 164, 181. During this time, although Wolkowski separately interviewed both Messerlian and McClelland, he made no notes of either interview and failed to file a report.[13] Moreover, Wolkowski failed to provide information to the hospital concerning the circumstances surrounding Topolosky's death. SA at 161-62. Based on this evidence, the government argued that, "once Wolkowski spoke to Messerlian and his partner, he did

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[13]Wolkowski testified before the federal grand jury that although written records were customary "in normal investigation[s] ... [t]his was out of the ordinary" because it involved a trooper in his barracks and because "somebody died in custody." SA at 177-78.

nothing [with respect to the investigation into Topolosky's death] . . . other than inspect the police cruiser and answer some telephone calls." Brief for the United States, Appeal No. 86-5345, at 8.

At approximately 4:40 a.m., over three hours after Wolkowski's arrival at the barracks at 1:00 a.m., Lieutenant Herbert Orth, the acting unit supervisor of the Major Crimes Unit ("MCU"),[14] took over the investigation of Topolosky's death. After MCU detectives left the Newark barracks, however, Wolkowski was left in charge of interviewing three of the occupants of the

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[14]The Major Crimes Unit is a unit of State Police detectives with state-wide jurisdiction to conduct investigations at the direction of the ranking officer of the State Police.. *See* Defendant-Appellant Henry F. Wolkowski's Brief on Appeal ("Wolkowski's Brief on Appeal") at 11.

Velazquez vehicle in order to ascertain how Topolosky died. Wolkowski personally interviewed Velazquez and briefed Troopers Mangione and Slattery on how to conduct the interviews of Guzman and Fontanez. *See* SA at 214-25. Velazquez, Guzman and Fontanez each testified that they told Wolkowski, Mangione and Slattery that they had witnessed one of the troopers assault Topolosky on the turnpike. None of the interview reports, however, mentioned the assault or made any reference to Topolosky's physical condition.[15] *See* Brief for

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[15]Velazquez, Fontanez and Guzman, who are Hispanic, indicated that they signed the incomplete statements prepared by Wolkowski, Slattery and Mangione in part because of their lack of proficiency in English. When they were reinterviewed by MCU detectives a few days later, however, each told the investigators that they had witnessed the assault and that they had reported it to the troopers during their initial interviews. *See* SA at 45-47, 212, 494-500, (Footnote continued on next page.)

United States, Appeal No. 86-5345, at 8-9. In addition, both Velazquez and Fontanez testified that, after they had reported the alleged assault during their interviews, they observed Wolkowski conferring with both Mangione and Slattery.[16]

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506. In addition, all four of the occupants of the Velazquez vehicle testified before both Union County grand juries and the federal grand jury that issued the instant indictments that they had witnessed the assault. On all three occasions, Velazquez, Fontanez and Guzman again indicated that they had reported the incident to Wolkowski, Mangione and Slattery.

[16]Specifically, Velazquez testified that each time he informed Wolkowski of the assault on Topolosky, Wolkowski "scratched his head and left the room." SA at 248-49. On two of the three occasions that Wolkowski left the interview, Velazquez observed him talking to Mangione and Slattery. *Id.* at 249. Fontanez testified that during his interview, Wolkowski entered the room and whispered something to Slattery "in secret." *Id.* at 43. Fontanez indicated that Slattery then removed the statement from the typewriter and followed Wolkowski out of the room. *Id.* at 44.

Finally, the government introduced evidence that, notwithstanding the testimony of the eyewitnesses, Wolkowski repeatedly denied ever receiving information about the alleged assault. In two interviews conducted by Lieutenant Orth of MCU, Wolkowski indicated that he had received no information from Velazquez concerning an assault on Topolosky, and that he had received no information from Mangione or Slattery that Guzman or Fontanez had made allegations of any wrongdoing. *See* SA at 199-200, 201-04, 214-25. In addition, the government introduced into evidence Wolkowski's testimony before the federal grand jury that, during his interview of Velazquez, Velazquez never mentioned anything about a beating and that Wolkowski never specifically asked Velazquez about the

fatal injuries Topolosky sustained.[17]

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[17]Sergeant Wolkowski's testimony reads as follows:

QUESTION: Your testimony is that Mr. Nelson Velasquez [sic], when you interviewed him on July 31st, 1982, never told you that he had witnessed a trooper striking Mr. Topolosky.

ANSWER: That is correct, he did not.

QUESTION: Your purpose in interviewing Mr. Velazquez was to find out how Mr. Topolosky might have suffered fatal injuries. Is that correct sir?

ANSWER: Yes.

QUESTION: Would you point to any place in this statement where Mr. Velazquez gave you any information or where you asked any particular question to find out what he knew about how Mr. Topolosky had been injured?

ANSWER: . . . There is no question like that . . . . The only line in here is his . . . response [where he told me] . . . he observed the driver of the van began to get excited and started to move from side to side, and kicked out the window. There is no question. I didn't ask him any question of that. I just said about an injury. What he had said here, I assumed that is what his injuries were.

QUESTION: But, Sergeant, you knew that, ... you knew generally that Mr. Topolosky had not died as a result of lacerations to his legs, that caused extensive bleeding and caused him to expire, didn't you? I mean you didn't think that was--you didn't think that his kicking out this window explained his death, did you, sir?

(Footnote continued on next page.)

With respect to Messerlian's involvement in the alleged conspiracy to obstruct justice, the government argued that Messerlian attempted throughout the investigation to mislead the authorities by offering contradictory accounts of

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ANSWER: I don't know. I don't know what you mean by that.

QUESTION: My question is whether you thought this line in here about Mr. Topolosky having kicked out the window in any way explained any injuries that he might have suffered, did that explain any injuries as far as you were concerned?

ANSWER: The fact that he got excited and was moving side to side, he kicked out a window, I don't know what injuries might have occurred from that. . . . I don't know.

QUESTION: Did you ever ask Mr. Velasquez if he had observed any injuries on Mr. Topolosky?

ANSWER: I asked Mr. Velasquez to tell me what he noticed and this is what he told me, and this is what I put down.

QUESTION: My question, sir, is whether you asked him specifically to tell you what injuries he observed on Mr. Topolosky.

ANSWER: No, I didn't ask that question.

QUESTION: Did you ask any follow-up questions when he gave you this narrative response?

ANSWER: "Do you have anything further to tell me," and he said he didn't.

the events on the turnpike. Specifically, the government introduced evidence that Messerlian, in his initial interview with MCU detectives, reported that, while he was setting flares to alert oncoming traffic to the accident, he observed Topolosky banging his head against the windows in the cruiser. Messerlian also stated that he observed Topolosky kick out the left rear window of the cruiser. Messerlian stated that at this point--after Topolosky kicked out the window--he entered the front seat of the cruiser and grabbed Topolosky, who then fell asleep. *See* SA at 205-06.

In his accident report filed within a week of the incident, Messerlian reasserted that he had observed Topolosky banging his head on the left rear window of the police

cruiser. Messerlian noted, however, that the disturbance stopped once he reached the vehicle. There was no reference in this report to Messerlian's having entered the cruiser in response to the disturbance. SA at 87.

In November 1982, over three months after the incident, Messerlian was interviewed by Lieutenant Orth. During this interview, Messerlian, for the first time, indicated that on the night of Topolosky's death there was a K-55 radar unit and a briefcase in the back seat of the police cruiser. *See* SA at 216. Subsequently, when testifying before the second Union County grand jury, Messerlian indicated that he reentered the cruiser before the window was broken, observed Topolosky repeatedly banging his head against the briefcase and radar unit and attempted

to prevent him from hurting himself. *Id.* at 88-96. Finally, Messerlian unequivocally stated before the federal grand jury that he never struck Topolsky either with his fists or with his flashlight. *Id.* at 349-51.

In addition to highlighting the inconsistencies in Messerlian's accounts of the events on the turnpike, the government offered evidence that overwhelmingly established that on the night of the alleged assault there was no briefcase or radar unit in Messerlian's cruiser. Nine witnesses, including the occupants of the Velazquez vehicle, the ambulance crew that transported Topolosky to the hospital and several state troopers involved in the subsequent investigation testified that they did not see a briefcase or a radar unit in the back seat of the cruiser on the

night of the accident. *See* SA at 36 (testimony of Fontanez), 84 (testimony of Ruiz), 102 (testimony of Sergeant Sheyka), 126-27 (testimony of Miles Kelly, ambulance crew member), 135 (testimony of John Couto, ambulance crew member), 190 (federal grand jury testimony of Sergeant Wolkowski), 193 (testimony of Sergeant MacArthur). Moreover, the daily activity log for Messerlian's cruiser indicated that no radar unit had been assigned to him on the night Topolosky sustained his fatal injuries. *See id.* at 115-16, 120-23, 167.

To counter the government's evidence relating to the alleged conspiracy, Wolkowski introduced evidence suggesting that his involvement in the investigation of Topolosky's death was fortuitous and that he merely acted

within the structured chain of command of the New Jersey State Police. He introduced evidence in an attempt to prove that he was called into the investigation solely because he lived approximately ten minutes away from the Newark barracks and was the detective most frequently summoned in emergency situations. Sergeant Sheyka, the senior trooper on duty on the night of the accident, testified that, after learning that Topolosky was pronounced dead on arrival at the hospital, the first persons that he notified were Lieutenant Russell MacArthur, the duty operations officer, and Sergeant First Class Weber, the station commander. *See* SA at 105-06. According to Sheyka, Wolkowski was notified "to make sure [Sheyka] ... covered all the bases on who to notify, what to do." *Id.* at 106. Sheyka also

expressed his understanding that the duty officer, Lieutenant MacArthur, "[would] make [the] ... decision[s] on what is going to transpire, not Detective Sergeant Wolkowski." *Id.* at 113. Wolkowski also introduced evidence that he was not required to make a report of his initial interviews with Messerlian and McClelland unless directed to do so by MCU detectives.

With respect to the government's allegation that Wolkowski orchestrated the taking of false statements, MCU detective Gary McWhorter testified that he instructed Wolkowski to take the statements from the three witnesses and to use troopers from the barracks to assist him. *See* Jt. App. at 86a. According to McWhorter, Wolkowski did not volunteer to take the statements, *id.* at 85a, but was asked to do so as an

accommodation to MCU. *See id.* at 86a. In addition, Sergeant Anthony Simonetti, the shift supervisor who replaced Sergeant Sheyka, testified that he independently selected Troopers Mangione and Slattery to assist in conducting the witness interviews and did not inform Wolkowski until after they had been selected. *See id.* at 87a. Wolkowski also introduced the testimony of several police officers who were present at the barracks at the time he statements were taken that they did not observe Wolkowski leave the interview room or confer with Mangione or Slattery during the course of the interview. *See* Wolkowski's Brief on Appeal at 18-20.

Finally, Wolkowski presented seven character witnesses who testified to Wolkowski's reputation for honesty and trustworthiness. *See* Jt. App. at

73a, 74a, 74.2a, 76a, 77a, 80a-81a; SA at 485-86.

C. MOTION FOR A NEW TRIAL

Following the return of the jury verdicts, a new issue arose involving allegations of prosecutorial misconduct during the course of the litigation.[18] The testimony of Dr. Aronson raised the question whether the prosecution concealed from Messerlian and Wolkowski exculpatory evidence that could have aided them in their defense. Dr. Aronson testified that, after a request by the prosecution, he reviewed the circumstances surrounding the death

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[18] A detailed account of the facts underlying those allegations is fully set forth in a lengthy and comprehensive decision by the district court reflecting defendants-appellants motions for new trials and need not be repeated here. *See United States v. Messerlian*, 633 F. Supp. 1493 (D.N.J. 1986).

of Topolosky. After conducting his review, he orally advised Assistant United States Attorney Anne Singer of his opinion that Topolosky's death resulted from the automobile accident and not from a beating. *Id.* at 1495.

Based on Dr. Aronson's testimony, Messerlian and Wolkowski moved for judgments of acquittal or for new trials. Alternatively, they requested a hearing to determine whether the government had violated the rule of *Brady v. Maryland*, 373 U.S. 83 (1963), which requires disclosure of exculpatory evidence to the defense, or whether the testimony of Dr. Aronson constituted new evidence sufficient to warrant a new trial under Federal Rule of Criminal Procedure 33. After a hearing on the motions, the district court concluded that Dr. Aronson's testimony was not

credible, and that, at any rate, his testimony was cumulative and would not have altered the jury's verdict. Consequently, the district court rejected defendants-appellants' *Brady* arguments. *Messerlian*, 633 F. Supp. at 1500-04, and their contention that Dr. Aronson's testimony constituted new evidence sufficient to warrant a new trial. *Id.* at 1504-10.

The district court also rejected Wolkowski and Messerlian's claims that there was insufficient evidence to sustain their convictions. *Messerlian*, 633 F. Supp. at 1513, 1515. Wolkowski's claims that the failure to grant his motion for severance was fatal error, that the instruction on the conspiracy count was improper, and that a new trial was warranted based on the weight of the evidence, were similarly

rejected. *Id.* at 1512-15. Accordingly, the district court concluded that Messerlian and Wolkowski received a fair trial and that all post-trial motions must be denied. *Id.* at 1515.

II.

We turn now to appellants' contentions on appeal. We shall consider first those claims specifically related to Messerlian's appeal from his conviction of violating the civil rights of Joseph Topolosky. Next, we shall consider those claims common to both Messerlian's and Wolkowski's appeals. Finally, we shall consider those claims peculiar to Wolkowski's appeal from his conviction of conspiracy to obstruct justice.

A. SPECIFIC INTENT ELEMENT OF § 242

Messerlian's primary contention on appeal is that the district court

improperly instructed the jury on the crucial element of specific intent under § 242. In particular, Messerlian argues that the district court's instructions "permitted the jury to convict Messerlian on the basis of mere excessive force." Messerlian's Brief on Appeal at 12-13. In this regard, Messerlian admonishes that "[i]f th[e] [district court's] charge is correct, then every intentional use of force by a police officer [that] is later deemed to be excessive violates § 242." Defendant/Appellant Harry H. Messerlian's Reply Brief ("Messerlian's Reply Brief") at 8. Additionally, Messerlian argues that the evidence adduced at trial was insufficient to support a jury verdict beyond a reasonable doubt that he possessed the requisite specific intent under §242.

A district court's duty to provide the jury with guidelines so that it may draw appropriate conclusions from the evidence is satisfied by "a clear articulation of the relevant legal criteria," *United States v. Goldblatt*, 813 F.2d 619, 623 (3d Cir. 1987), and the determination of the particular language to be employed when charging the jury is within the sound discretion of the district court. *See id.* In assessing the propriety of the district court's instructions, we must "determine whether the charge, taken as a whole and viewed in the light of the evidence, fairly and adequately submits the issues in the case to the jury [without confusing or misleading the jurors].'" *United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183, 1195 (3d Cir. 1984) (citations omitted), *cert. denied*, 470 U.S.

1029 (1985). If the jury charge is adequate, we must consider Messerlian's claim that the evidence is nonetheless insufficient to support his conviction. In addressing this claim, our task is to "view[] the evidence in the light most favorable to the prosecution," *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), and to sustain the verdict if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (original emphasis); *accord United States v. Martorano*, 709 F. 2d 863, 866 (3d Cir.) ("When the sufficiency of the evidence is challenged in a criminal case, the standard of review is whether a jury could reasonably infer from the evidence that the defendant is guilty of the offense with which he is charged."), *cert. denied*, 464 U.S. 993 (1983).

1. The Jury Charge

Although Messerlian generally contests the adequacy of the district court's instructions to the jury on the issue of specific intent, he also selects three paragraphs of the jury charge and argues that "[v]iewed together, these paragraphs... convey that if Messerlian intentionally struck Topolosky with his flashlight, and if this conduct was excessive under state law, then the jury was entitled to find Messerlian guilty of a §242 violation." Messerlian's Brief on Appeal at 21-22. We disagree.

The challenged provisions of the district court's charge read as follows:

> You may find that the defendant Messerlian acted with the requisite specific intent, even if you find he had no real

> familiarity with the Constitution, or with a particular constitutional right involved, provided you find that the defendant willfully and consciously did the act which deprived the person of his constitutional rights. If you find that Mr. Messerlian knew what he was doing, and that he intended to do what he was doing, and if you find that what he did constituted a deprivation of a constitutional right, then you may conclude the defendant Messerlian acted with the specific intent to deprive the victim of a constitutional right.

Id. at 797a.

> Obviously, not every striking by a police officer or use of force by a police officer would constitute a violation of the constitutional right of a citizen. It is only when it is excessive, unreasonable, and unnecessary, and beyond that which is authorized under state law, for such officers to use.

Id. at 799a.

Essentially, Messerlian's objection to the jury charge is two-fold. First, Messerlian contends that the

above challenged provisions of the jury charge inaccurately characterize the applicable law in that they authorize the jury to make a *post hoc* determination whether the force employed by Messerlian was excessive, which, if found, could properly support a conviction under §242. Second, Messerlian maintains that, consistent with the government's theory and evidence at trial, the district court was required to instruct the jury that, in order to convict, it *must* find that Messerlian possessed the specific intent to punish Topolosky. Although we agree with Messerlian that a conviction based solely on the mere use of excessive force would be contrary to the law, we disagree with his assertion that the challenged provisions of the court's instructions, or, indeed, that the instructions as a whole, have the effect

of sanctioning such a conviction. Further, we reject Messerlian's contention that the district court was required to instruct the jury that the only basis upon which it could convict was the intent to inflict summary punishment. In any event, we find that the district court properly charged the jury on the issue of summary punishment.

In *Screws v. United States*, 325 U.S. 91 (1945), the Supreme Court rendered its seminal decision defining the specific intent required to support a criminal prosecution under the federal civil rights law.[19] The Court held that "the specific intent required by the Act is an intent to deprive a person of a right which has been made specific either by the express terms of the

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[19]*Screws* considered the predecessor statute to 18 U.S.C. §242 (1982).

Constitution or laws of the United States or by decisions interpreting them." *Id.* at 104. It is beyond dispute that the "right to personal security," *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982), is such a right.[20] See *United States v. Dise*, 763 F.2d 586, 588 (3d Cir.) (personal security and freedom from bodily restraint, have always been protected by the due process clause of the fourteenth amendment"), *cert. denied*, 474 U.S. 982 (1985).

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[20]This Court has consistently acknowledged that the fourteenth amendment's guarantee of personal security includes protection form unwarranted invasion by official authority. *See, e.g., Black v. Stephens*, 662 F.2d 181, 188 (3d Cir. 1981) ("law enforcement officer's...application of undue force may deprive the victim of a fourteenth amendment 'liberty' without due process of law") (citations omitted), *cert. denied*, 455 U.S. 1008 (1982); *Rhodes v. Robinson*, 612 F. 2d 766, 772 (3d. Cir. 1979) ("due process clause ... extends to protection from an official's abusive exercise of his powers to inflict grossly undue harm").

Elaborating on the requirement of specific intent, the Court in *Screws* identified two bases for a proper § 242 conviction. First, the Court indicated that proof of an intentional deprivation of a person's constitutional rights could sustain a conviction under §242. In this regard, the Court noted that

> [t]he fact that ... [a] defendant[] may not have been thinking in constitutional terms is not material where the[] aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution. When they so act they at least act in reckless disregard of constitutional prohibitions or guarantees.

Screws, 325 U.S. at 106. Second, the Court observed that "those who decide to take the law into their own hands and act as prosecutor, jury, judge, and executioner plainly act to deprive a

prisoner of the trial [that] due process of law guarantees him [or her]." *Id.* Where proof of such intent to inflict summary punishment exists, a conviction under §242 is proper.

We have reviewed the instructions of the district court as a whole and find that they comport with the legal standard set forth in *Screws*. Moreover, viewing the challenged instructions in isolation, we find that the district court accurately instructed the jurors on the governing law. Specifically, the first provision attacked by Messerlian merely summarizes the holding in *Screws* that the defendant need not be thinking in constitutional terms to violate the statute. Nor does the district court's reference to willful and conscious action render the charge defective. The district court carefully

defined for the jury the term "willfulness as requiring proof of an act "done voluntarily and intentionally, and with the specific intent to do something [that] the law forbids." Jt. App. at 796a. Thus, the challenged passage did not permit the jurors to convict Messerlian solely on the basis of a conscious assault. *See Dise*, 763 F.2d at 591 (approving a similar instruction).

Messerlian's objection to the second quoted passage from the district court's charge represents an inartful attempt at deception. As it appears in the district court's actual charge to the jury, that passage precedes a brief recess in the proceedings and merely operates to summarize the court's lengthy instructions to the jury up to that point. In particular, that paragraph, read in context, instructed the

jury that they could convict only if they found that Messerlian deprived Topolosky of a constitutional right and that Messerlian knew what he was doing was a violation of the law.

Finally, as pointed out by the government, the last passage challenged by Messerlian "accurately describes what constitutes a constitutional violation. It does not address the issue of specific intent at all." Brief for the United States at 40. In other words, the district court merely informed the jury about when the use of force by a police officer rises to the level of a constitutional violation. The question whether the officer intentionally exerted such force knowing it to be unlawful is not addressed in this passage.

We find that the district court's instructions did not permit or encourage the jury to convict Messerlian solely on the basis of an intent to strike. Our decision today is reinforced by a prior decision of this Court approving instructions virtually identical to those challenged by Messerlian. *United States v. Dise*, 763 F.2d 586 (3d Cir.), *cert. denied*, 474 U.S. 982 (1985). We find Messerlian's attempts to distinguish *Dise* unpersuasive.

Messerlian also challenges the district court's jury charge on the ground that it failed to instruct the jury that a finding of specific intent to inflict summary punishment was necessary in order to convict. Messerlian bases his argument in part on his interpretation of the government's evidence

and on a statement by the district court that "the evidence adduced in the Government's case could allow the jury to find beyond a reasonable doubt that Messerlian administered 'a physical beating as punishment for allegedly breaking the law....'" Jt. App. at 360a (*quoting United States v. Delerme*, 457 F.2d 156, 161 (3d Cir. 1972).

As *Screws* and its progeny make clear, violations of §242 are not limited to willful inflictions of summary punishment. Indeed, as noted by this Court in *Dise* a violation of §242 is established if a defendant "acted in reckless disregard of the law as he understood it." 763 F.2d at 592. Moreover, evidence was admitted at trial on the amount of force that may be used to subdue a prisoner. The district court

specifically referred to such evidence in its instructions to the jury. *See* Jt. App. at 795a, 799a. Thus, the government was entitled to a charge under both theories.

Finally, we find that the district court's instruction on the issue of summary punishment accurately stated the law and provided the jury with the proper guidelines on which to convict. In pertinent part, that instruction provides:

> If you conclude that Messerlian's actions were an expression of retaliation or summary punishment for the act of Topolosky kicking out the car window in the troop car, and you conclude each of the other elements has been proven then you may find Mr. Messerlian guilty of Count 1.

Jt. App. at 802a. We conclude that the district court's instructions on summary punishment were not in error.

2. Sufficiency of the Evidence

We now consider Messerlian's claim of insufficiency of evidence to support a jury finding of specific intent. We believe the facts speak for themselves. As the district court found,

> the record allows a reasonable juror to conclude that, one, Messerlian administered the blows [that] have been described by the medical experts; and two, that he so not for any legitimate police purpose, such as for the protection of persons of property, but rather for the purpose of administering punishment.
>
> We find that the evidence adduced in the government's case could allow the jury to find beyond a reasonable doubt that Messerlian administered "a physical beating as punishment for allegedly breaking the law[, acting] as prosecutor, judge, and jury." *United*

States v. Delerme, 457 F.2d 156, 161 (3d Cir. 1972).

Messerlian, 633 F. Supp. at 1515. In addition, as is described in the preceding section, there was sufficient evidence from which a rational trier of fact could conclude that Messerlian used excessive force, specifically intending to use such force and knowing it to be excessive.

Messerlian's contention that the time he was in the cruiser was not sufficient for him to form a specific intent is specious. Under this reasoning, a single, deliberate and fatal blow could never rise to the level of a violation under §242. Furthermore, Messerlian's argument fails to take into account the amount of time that he acknowledged elapsed immediately preceding the actual assault.

B. MESSERLIAN'S CONVICTIONS ON COUNTS 2 AND 3

Notwithstanding our conclusion that Messerlian was properly convicted on Count 1, we briefly address his claim that reversal on Count 1 necessarily requires reversal on Counts 2 and 3. We conclude that Messerlian's claim is utterly without merit.

Messerlian contends that because of the "significant interrelationship" between Counts 1, 2 and 3, absent a proper conviction on Count 1, "there is no doubt that the jury would also have returned verdicts of not guilty as to the remainder of the indictment." Messerlian's Brief on Appeal at 30. In support of this contention, Messerlian points to a colloquy between the district court and

the prosecution in which the implications of Count 1 not guilty verdict on the remaining counts were discussed. *Id.* at 31. At issue is this observation by the district court: "One reality has to do with did the assault take place, and then the other reality has to do with did people try to cover up the assault, but now we have to go back to whether the assault took place." *Id.*

The district court's statement in no way supports Messerlian's claim. The central fact issue at trial, as characterized by Messerlian, was whether he had actually struck Topolosky with his flashlight, causing Topolosky's death, or whether Topolosky died by other means. The quoted statements is relevant, then, only if the jury concluded that Messerlian had done nothing at all. As noted by the

government, the jury could reasonably acquit on Count 1 and still find that Messerlian committed an assault, sought to conceal that fact, specifically entered into a conspiracy to obstruct justice and perjured himself toward that end. *See* Brief for the United States, Appeal No. 86-5323, at 45-47. Accordingly, we reject Messerlian's argument that his convictions on Counts 2 and 3 cannot be sustained.

III.

We turn now to those claims common to both Messerlian's and Wolkowski's appeals.

A. THE LEGAL SUFFICIENCY OF COUNT 2

Appellants challenge their convictions of conspiracy to obstruct justice on two grounds. First, they argue that Count 2 is defective because

it fails to charge that a federal judicial proceeding was pending or imminent at the time the alleged conspiracy was formed. Second, appellants contend that the district court improperly instructed the jury that if could convict if it found that a federal proceeding was foreseeable. We find both claims without merit.

First, Messerlian and Wolkowski were convicted of conspiring to obstruct justice in violation of 18 U.S.C. §371 (1982). In *United States v. Perlstein*, 126 F.2d 789 (3d Cir.), *cert. denied*, 316 U.S. 678 (1942), this Court -- constructing the predecessor statute to § 371 -- addressed and rejected the very

argument raised by appellants today.[21] Upholding convictions of conspiracy to obstruct justice, the *Perlstein* Court distinguished the requisite elements for a conspiracy prosecution from those that undergird the substantive offense of obstruction of justice. Specifically, this Court recognized that,

> [w]hile it is true that the obstruction [of justice] can arise only when justice is being administered, that is to

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[21]The specific question addressed by the *Perlstein* Court was:

> Were the appellants properly convicted on a count charging them with conspiracy to obstruct justice ...when the conspiracy was entered into at a time when there was no proceeding pending..., though continued into a period when there were proceedings pending..., and acts in furtherance of the conspiracy were committed both prior to and after the commencement of the proceedings referred to?

126 F.2d at 793.

> say when a proceeding is pending, there is nothing to prevent a conspiracy to obstruct the due administration of justice in a proceeding which becomes pending in the future from being cognizable under Section 37.

126 F.2d at 796. Moreover, the *Perlstein* Court was unable to

> see [any] reason why persons who conspire together to obstruct justice in a proceeding before a United States Commissioner or in a district court [that] they expect or fear will be instituted should not incur the penalties prescribed by Section 37 of the Criminal Code even if it be assumed that they could not be found guilty of the substantive crime described in Section 135, provided that one of them does an overt act designed to consummate their purpose and the commission of that act affects a pending proceeding.[22]

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[22]Appellant's argument that Perlstein in inapplicable because the alleged conspiracy in the instant appeal was "directed at a state investigation, not at a federal judicial proceeding," Wolkowski's Brief on Appeal at 38-39, is without merit. Count 2 of the indictment charged appellants with conspiring to obstruct the adminis-

(Footnote continued on next page.)

Id. at 795. *Perlstein* clearly controls the instant appeal. None of the arguments advanced by appellants convinces us of the contrary. Indeed, the decisions relied upon by appellants merely reiterate the proposition recognized in *Perlstein*, that to convict on the substantive offense of obstructing justice, a judicial proceeding must be pending.

(Footnote continued from previous page.)
trative of justice. As part of the plan and purpose of the conspiracy, the indictment charged that appellants sought to "prevent the citizens of the District of New Jersey and law enforcement authorities of New Jersey and the United States" from learning of the assault on Topolosky. Jt. App. at 17a; *see also Messerlian*, 633 F. Supp. at 1513 ("the government's theory [was] that the conspiracy [was] aimed at preventing disclosure to 'all comers'"). Similarly, in *Perlstein*, the conspiracy charged was "one to suppress evidence and to keep persons . . . from disclosing what they knew to any investigating agency or body whether of the State of New Jersey or of the United States." 126 F.2d at 792. Thus, the government's reliance in part on overt acts designed to obstruct state or both state and federal proceedings does not render the indictment defective.

126 F.2d at 796; *accord Pettibone v. United States*, 148 U.S. 197, 206 (1893); *United States v. Shoup*, 608 F.2d 950, 959-60 (3d Cir. 1979); *United States v. Walasek*, 527 F.2d 676, 678 (3d Cir. 1975). Accordingly, we hold that the conspiracy charge contained in Count 2 of the indictment is legally sufficient.

For similar reasons, we reject appellants' related claim that the district court erroneously instructed the jury on the conspiracy count. The district court's charge on Count 2 reads in pertinent part:

> The conspiracy charged in Count 2 of this indictment alleges that each of the defendants conspired with each other corruptly to impede the due administration of justice in violation of federal law. In the context of this case, the phrase corruptly impeding the due administration of justice relates to an intent to obstruct the federal Grand

> Jury's investigation into the circumstances surrounding the death of Joseph Topolosky. The Government is not required to prove that the federal Grand Jury's investigation was actually obstructed, nor does the government need prove that a Federal Grand Jury was hearing evidence in this matter at the time the conspiracy was formed. Rather, it is sufficient for the government to prove that each defendant willfully participated in the lawful plan with the understanding that one of its objectives was, *or would foreseeably become the obstruction of a Federal Grand Jury investigation*. As stated, each defendant must shown [sic] to have willfully participated in the unlawful plan.

Jt. App. at 808a-09a (emphasis added). Appellants maintain that the italicized portion of the district court's instructions "permitted the jury to find the defendants guilty if it found that they agreed to obstruct only state judicial proceedings so long as it also found that it was foreseeable that federal

grand jury proceedings would commence in the future." Wolkowski's Brief on Appeal at 41-42.

We think that appellants misread the plain language of the jury charge and, further, that they misunderstand the requisite elements necessary to sustain a conspiracy conviction. First we find that the jury charge clearly required the government to prove that the conspirators undertook to obstruct the due administration of justice in a federal proceeding that they anticipated would commence in the future. In other words, the charge authorized the jury to convict if the federal proceeding was foreseeable to the conspirators and they willfully agreed to engage in certain activity

that they knew and intended would obstruct justice in the anticipated federal proceeding should it actually commence in the future. Second, *Perlstein* makes clear that the federal proceeding need not be pending at the time the conspiracy is formed. Indeed, the primary purpose of the conspiracy charged in the instant indictment was the total prevention of such proceedings by deliberately concealing evidence that could form the basis of a federal

prosecution.[23] We find no error in the charge to the jury on Count 2.

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[23]Appellants argue in the alternative that, even if the district court properly instructed the jury as to the foreseeability of a federal proceeding, "there is no evidence on the record to support a jury finding that the defendants could have foreseen that federal judicial proceedings would commence." Wolkowski's Brief on Appeal at 42. We find this argument to be completely untenable. Wolkowski and Messerlian were, respectively, twenty-five and ten year veterans of the New Jersey State Police. On that basis alone, knowledge that federal investigations often follow where an arrestee suspiciously dies in policy custody may be properly imputed to them. At any rate, the government introduced evidence that police trainees are instructed in the Consitution and on the rights of detainees. *See* SA at 291-92. In addition, from the evidence presented in connection with the §242 allegation concerning police training on what constitutes lawful conduct, the jury could legitimately infer that both Messerlian and Wolkowski understood that certain conduct could constitute a violation under either state or federal law, or both.

B. NONDISCLOSURE OF DR. ARONSON'S OPINION

The next claim common to both Messerlian's and Wolkowski's appeals is that the government's failure to disclose the opinion it obtained from Dr. Aronson constitutes a violation of both the rule enunciated in *Brady v. Maryland*, 373 U.S. 83 (1963), and Federal Rule of Criminal Procedure 16. Specifically, appellants reassert their contention raised before the district court that the government was required to disclose Dr. Aronson's opinion to the defense under *Brady*. In addition, appellants argue for the first time on appeal that the government's failure to disclose Dr. Aronson's oral report to the defense constitutes a breach of its duty under Fed. R. Crim. P. 16(a)(1)(D)

to provide the defense with "any result or report" of tests or examinations.

Following the trial in this matter, after reading a newspaper account of the conviction of Trooper Messerlian in connection with the death of Joseph Topolosky, Dr. Aronson, through his attorney, informed the district court that he had provided arguably exculpatory evidence to Assistant United States Attorney Anne Singer. Specifically, Dr. Aronson maintained that in March 1984, Singer contacted him and requested that he examine certain documents and records concerning the death of Topolosky and formulate a preliminary opinion as to the manner and cause of death. Dr. Aronson indicated that, following his review of the materials, he had a telephone conversation with Singer in

which he indicated that in his opinion Topolosky's death resulted from the automobile collision. At that time, according to Dr. Aronson, Singer thanked him for his services, requested that he send her a bill, and relieved him of any further involvement in the case. Singer, however, testified that Dr. Aronson never related to her his opinion that Topolosky died as a result of the automobile accident. Instead, Singer recalled Aronson's opinion as being generally consistent with the medical evidence already obtained.

The district court subsequently held an evidentiary hearing on the alleged *Brady* violation. After hearing testimony from Both Dr. Aronson and Assistant United States Attorney Singer, the district court issued a comprehensive opinion in which it explicitly

concluded "that Dr. Aronson came into court, sat in the witness stand, took an oath, and, for reasons unknown, lied." *Messerlian*, 633 F. Supp. at 1495. The court found that "Dr. Aronson did not tell Ms. Singer that he held the opinion that Joseph Topolosky's death was caused by the motor vehicle accident." *Id.* at 1501. Rather, "[t]he substance of the oral opinion [that] Dr. Aronson communicated to Ms. Singer was that the cause of death was a subarachnoid hemorrhage caused by blows of moderate force." *Id.* Based on these findings, the district court concluded that the government was not in possession of exculpatory evidence and, thus, could not have violated *Brady*. We agree.

The district court findings and conclusions are based "to a significant degree on an assessment of intangible

factors - tone of voice, manner of reacting to questions, responses to questions and attitudes displayed...." *Messerlian*, 633 F. Supp. at 1501. More importantly, the district court found that Dr. Aronson's "recollection [of the opinion he had conveyed to Ms. Singer] apparently moved in a steady fashion from a point where he had suggested possible alternative manners of death to the final point, at the hearing ... where he stated his final conclusion that the death should be classified as accidental, as having been caused by the motor vehicle accident." *Id.* at 1502. Accordingly, the district court concluded that "the enhancement [, on four separate occasions,] of [Dr. Aronson's] recollection of transmitting exculpatory information [to Ms. Singer.]...call[ed]

into question the reliability of that recollection." *Id.* at 1501.

Appellants' argument on appeal does not specifically challenge the findings and conclusions of the district court. *See* Messerlian's Brief of Appeal at 38. Instead, appellants imply that a close reading of the entire record of the post-trial hearing requires reversal of the district court's finding of no *Brady* violation. We disagree. Having undertaken the task urged upon us, we conclude that the district court's findings of fact with regard to the credibility and reliability of Dr. Aronson's testimony are not clearly erroneous. Notwithstanding the directness of the district court's credibility findings, that court was best situated to observe the demeanor of the two witnesses and to assess the

consistency of their testimony. Moreover, we find the district court's reasoning to be persuasive and note that its ultimate findings are amply supported by the record. Accordingly, we find no error in the district court's conclusions of law.

Appellants' remaining contention, that Rule 16 obligated the government to disclose the oral opinion of Dr. Aronson, does not persuade us that the district court erred. At the outset, we recognize that the disclosure provision of Rule 16 is arguably broader than the *Brady* requirement. Under Rule 16(a)(1)(D), the information that the government must disclose need not be exculpatory; it merely must be material to the preparation of the defense. Although the question whether Rule 16(a)(1)(D)'s disclosure requirement

applies to oral reports has not been resolved by this Court, we do not think that its resolution is necessary to the disposition of these appeals.[24] Assuming *arguendo* that that provision requires disclosure of oral opinions such as that involved here, the government's violation of the rule must prejudice substantial rights of the defendants before we may overturn their convictions. After reviewing the record and appellants' arguments on appeal, we find that no substantial rights of the appellants were affected by the nondisclosure of Dr. Aronson's oral opinion

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[24]The two Courts of appeals that have addressed this issue have concluded that Rule 16(a)(1)(D) only requires disclosure of written reports. See *United States v. Shue*, 766 F. 2d 1122, 1135 (7th Cir. 1985); *United vs. Glaze*, 643 F. 2d 549, 555 (8th Cir. 1981).

which, in the district court's view, was either cumulative or incredible.

IV.

Finally, we address those claims unique to Wolkowski's appeal from his conviction of conspiracy to obstruct justice.

A. SUFFICIENCY OF THE EVIDENCE

Wolkowski reasserts on appeal his argument that the factual record in this case cannot support a reasonable jury verdict finding him guilty of conspiracy to obstruct justice. As we discussed in section II, the standard for reviewing Wolkowski's sufficiency of the evidence claim is whether, after resolving all inferences in favor of the government, "*any* rational trier of fact could have found essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (original

emphasis). Under this standard our review is plenary. *Paez v. O'Lone*, 772 F. 2d 1158, 1159 (3d Cir. 1985). Wolkowski vigorously argues that the evidence was insufficient to sustain the government's factual allegations linking Wolkowski to a conspiracy to obstruct justice. In this regard, Wolkowski maintains that evidence of an agreement or of acts in furtherance of an illegal purpose is lacking. After carefully reviewing the record, we find these arguments without merit.

In support of his claim that there is insufficient evidence to convict him on Count 2, Wolkowski emphasizes testimony that the MCU took over the investigation in the early morning hours following Topolosky's death. Wolkowski's argument implies that, because the MCU was in charge, he

had no control over the progress or conduct of the investigation. He contends that there is no evidence of any motivation on his part to conceal reports of the assault on Topolosky in the witness statements prepared by him and Troopers Mangione and Slattery, nor evidence of his ability to direct those troopers so to conceal the assault. On the latter point, Wolkowski emphasizes that he was not involved in the selection of Mangione and Slattery to assist in conducting the witness interviews. Similarly, Wolkowski argues that his failure to make a record of his interviews with Messerlian and McClelland is directly attributable to MCU's control over the investigation. Wolkowski misunderstands the charge against him. The fact that another entity was ultimately responsible for the investigation

does not negate evidence that Wolkowski acted in furtherance of an illegal purpose. Notwithstanding the MCU's involvement, a rational juror could infer that Wolkowski did commit one or more of the "overt acts" attributed to him by the government.

Wolkowski's argument that he could not have arranged for the omission of references to the assault in the witness statements is based, in part, on various inconsistencies in the testimony. Where there are disputes in the testimony, however, they must be resolved in favor of the prosecution. *See Jackson*, 443, U.S. at 326. The inconsistencies among the state troopers' versions of the taking of witness statements and the versions offered by the witnesses themselves are not of such magnitude as to raise reasonable doubts

about the verdict. Such inconsistencies are not unusual given the long span of time between the events in question and the trial, the ubiquitous recollections of various witnesses and the nature of the charges. A rational trier of fact could certainly discredit the troopers' testimony about how the interviews were handled, and credit Velazquez's, Fontanez's and Guzman's assertions that they had described the assault to their interviewers.

Although the record leaves us doubting whether Wolkowski consistently failed to provide routine information to hospital personnel, that doubt alone is insufficient to raise grave concerns with regard to the reasonableness of the verdict. Absolute proof that Wolkowski repeatedly eluded requests for information concerning Topolosky's death was

not essential to the government's case or necessary to sustain a guilty verdict. Rather, the cumulative effect of Wolkowski's conduct, including the failure to provide information on at least two occasions, and the reasonable inferences drawn therefrom, amply support his conspiracy conviction.

Direct evidence in support of the government's argument that a "cover-up" began with the meeting between Wolkowski and Messerlian at the Newark barracks shortly after the accident is similarly lacking. As noted by the government, however, it "need not introduce evidence of a written, spoken or express agreement" to establish the formation of a conspiracy. Brief for the United States, Appeal No. 86-5345, at 19. "Rather, all that is required is evidence of a tacit agreement [that] may

be inferred after consideration of all the circumstances." *Id.* We agree with the government that the evidence in the record is sufficient to allow a reasonable juror to find that Wolkowski entered into a conspiracy with Messerlian to conceal the assault on Topolosky and to obstruct all investigations -- state and federal -- into the circumstances surrounding Topolosky's death. Moreover, it is perfectly proper to allow the jury to infer these acts from circumstantial evidence. *See Paez*, 772, F.2d at 1160.

Finally, although Wolkowski was acquitted of perjury, there is ample evidence that he testified untruthfully at the federal grand jury proceedings. Inconsistency of the verdicts does not necessarily mean that the jury did not consider the evidence of perjury in

deciding whether a conspiratorial act had occurred. In this regard, we note the well-established rule that jury verdicts in criminal cases will stand, despite internal inconsistencies, so long as there is sufficient evidence to support the verdict. *See United States v. Powell*, 469 U.S. 57 (1984) ("[T]here is no reason to vacate the respondent's conviction merely because the verdicts cannot be rationally reconciled...Th[is] rule...has stood without exception in this court for 53 years."); *Harris v. Rivera*, 454 U.S. 339 (1981); *Hamling v. United States*, 418 U.S. 87 (1974); *Dunn v. United States*, 284 U.S. 390 (1932); *see also United States v. Continental Group, Inc.*, 603 F. 2d 444 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980). Our role upon review of such cases is not to attempt to rationalize

the jury's verdict or to reconcile apparently inconsistent findings. Rather, we "need only determine whether there was sufficient evidence upon which the guilty verdict can be sustained." *United States v. McCall*, 592 F. 2d 1066, 1068 (9th Cir.), *cert. denied*, 441 U.S. 936 (1979); *see also United States v. McQueeney*, 674 F. 2d 109, 115 (1st Cir. 1982).

In this case, despite the apparent inconsistency of the jury's finding between Counts 2 and 3, its verdict retains vitality. We agree with the district court that "the facts of this case fit squarely within the *Dunn/Powell* rule, and we therefore reject any argument premised on the adoption of the purported reasoning of the jury." *Messerlian*, 633 F. Supp. at 1512. Thus, while not raised on appeal, we find that

the evidence of perjury as an "overt act" of conspiracy could legitimately support a conviction on Count 2 by a rational trier of fact.

To prove conspiracy, the government must show beyond a reasonable doubt that one of the co-conspirators committed one or more overt acts furtherance of an illegal objective.[25] Accordingly, the demonstration of a conspiracy under 18 U.S.C. §371 requires only that the government show that an agreement was formed and that one of the conspirators committed at least one overt act in furtherance of the illegal

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[25]We note also that the government's allegation that Messerlian perjured himself before the federal grand jury was also charged as an overt act in furtherance of the conspiracy. Messerlian was convicted on that count, which demonstrates that the jury expressly found that *at least* one overt act was committed by one of the conspirators.

purpose. *United States v. Forzese*, 756 F.2d 217 (1st Cir. 1985); *United States v. Anderson*, 611 F.2d 504 (4th Cir. 1979); *United States v. Lyman*, 592 F.2d 496 (9th Cir. 1979), *cert. denied*, 442 U.S. 931 (1979). *United States v. Trowery*, 542 F.2d 623 (3d Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 1104 (1977). Our review of the evidence convinces us that "any rational trier of fact," *Jackson*, 443 U.S. at 319, could have found these elements of conspiracy as to Wolkowski beyond a reasonable doubt.

B. WEIGHT OF THE EVIDENCE

Finally, Wolkowski claims that the verdict was against the weight of the evidence because the federal proceeding was unforseeable. He also argues that the verdict was a miscarriage of justice, referring to the acquittal of

himself, Mangione and Slattery on the perjury counts, the rejection of Dr. Aronson's post-trial evidence and his long career of public service in support of this claim.

Our review of this claim is governed by the "abuse of discretion" standard. *See United States v. Hsieh Hui Mei Chen*, 754 F.2d 817 (9th Cir.), *cert. denied*, 471 U.S. 1139 (1985). We have already discussed and dismissed appellants' arguments with respect to the foreseeability instruction, the acquittal on perjury charges and Dr. Aronson's testimony. Furthermore, we are in complete accord with the reasons stated by the district court in denying the motion for new trial. *See Messerlian*, 633 F. Supp. at 1512-16. We conclude, therefore, that the district court did not abuse its discretion in

denying Wolkowski's motion. In doing so, we share in the district court's recognition "that the verdicts have unhappy implications for everyone within the criminal justice system," *id.* at 1516, not the least of whom are the individuals who appeal here.

V.

CONCLUSION

For the foregoing reasons, the convictions and sentences of the appellants will be affirmed.

APPENDIX B

UNITED STATES of America
V.
Harry H. Messerlian and Henry F. Wolkowski, Defendants.
Crim. No. 85-262 (AET).
United States District Court,
D. New Jersey.
April 29, 1986.

OPINION

THOMPSON, District Judge.

INTRODUCTION

Harry Messerlian and Henry Wolkowski, members of the New Jersey State Police, move before this court for an order overturning the verdict of a jury which sat in judgment over a three-month trial. Messerlian stands convicted of violating the civil rights of Joseph Topolosky by striking him with a heavy, weapon-like flashlight--blows which resulted in Topolosky's death--as well as conspiring to obscure this beating from the eyes of federal authorities and lying to a federal grand

jury. Wolkowski was convicted of conspiring with Messerlian "and others" to obstruct the federal investigation.

This jury was urged by the prosecution and defense counsel to adopt conflicting versions of the case. By the prosecution, they were urged to bring to justice men who allegedly abused the power and authority of their offices. By the defense, they were urged to vindicate men who, they argued, were properly performing the most dangerous and least rewarded job society asks of its members. The jurors heard testimony from civilians describing a brutal assault on a shackled, intoxicated prisoner. They heard police officers describe an orderly and proper arrest of a drunk driver who was placing his children--and others--at risk. They

heard extensive and dense medical testimony in which distinquished and experienced doctors referred to the same evidence and reached contrary conclusions.

The jury heard considerable character evidence. Witnesses discussed the character of the victim, Joseph Topolosky. The character of the fact witnesses was made a significant issue on a number of occasions. The jurors were presented with an array of witnesses testifying to the good character of the defendants: family members, police officers, State Troopers, the Superintendent of the New Jersey State Police, agents of the F.B.I. (the federal law enforcement agency charged with investigating the death) and an incumbent County Prosecutor for the State of New Jersey. By turns these

proceedings appeared to be a trial of Joseph Topolosky for having been a troubled, self-destructive and angry man; of the civilian eyewitnesses for their allegedly wrongful accusation that police officers had broken the law; of the New Jersey State Police for allegedly turning inward to protect its own; and of the United States Department of Justice for coming into this state to prosecute police officers who had not been brought to trial by the State of New Jersey.

After sitting through three months of trial the jurors took the case, deliberated for over 40 hours, and returned with their verdicts. They had the difficult task of assessing the credibility of the witnesses, deciding where the truth lay and drawing the

legitimate inferences from the evidence. At the completion of their deliberations, they rendered unanimous verdicts.

We may not lightly disturb the considered and obviously conscientious determinations of the jurors. We must, of course, examine the record relied upon by the jurors to ensure that no defendant stands convicted on insufficient evidence or by an irrational verdict. With this tension in mind, we have examined the pending motions. In large part, they are supported by restatements of prior arguments. We addressed these arguments at length prior to trial and at the close of the government's case. We have reexamined the evidence and reconsidered the arguments for the purpose of ruling on the present motions. As is more fully

described below, we find that these renewed motions must be denied.

A new issue arose following the return of the verdict, involving the emergence of the testimony of Dr. Marvin Aronson, Medical examiner for the City of Philadelphia. The nub of Dr. Aronson's testimony is that the Office of the United States Attorney for the District of New Jersey concealed from the defendants evidence which could have aided them in their defense. He asserted, in a hearing before the court, that in 1984 he delivered to an attorney for the government an opinion that Joseph Topolosky's death was caused by a motor vehicle accident and not by a beating. We heard Dr. Aronson describe his version of his professional contacts with the U.S. Attorney's Office. We must find that Dr. Aronson came into

court, sat in the witness stand, took an oath, and, for reasons unknown, lied. We find that no evidence of an exculpatory nature was concealed from the defendants.

We also find that Dr. Aronson's testimony is not "new evidence" giving rise to a basis for a new trial. His opinion testimony--for he offered no new facts--adds nothing of substance to that previously before the jury. His opinions are tied to the well-developed factual record of this case in only the most attenuated fashion; he did little more than connect selected portions of the evidence to an academic theory, while rejecting that factual evidence which he found inconsistent with his opinions.

I. Testimony of Doctor Aronson

Following the return of the jury's verdict, but prior to the return date of the post-trial motions, we received a letter from Gregory Linsin, prosecuting attorney for the United States Department of Justice, regarding his contact with Richard Sprague, Esquire, of Philadelphia, an attorney for Dr. Marvin Aronson. By this letter, Mr. Linsin notified the court and defense counsel of Dr. Aronson's stated belief that the Office of the United States Attorney for the District of New Jersey had improperly concealed information from defense counsel in connection with this prosecution. Mr. Linsin indicated in his letter that Richard Sprague had communicated to him that "Dr. Aronson was of the view that the opinion he rendered orally to a member

of the U.S. Attorney's Office was arguably exculpatory and Mr.Sprague inquired if Dr. Aronson's name had been provided to the defendants."

Mr. Linsin went on to state that Dr. Aronson, a forensic pathologist, had in fact been consulted by the U.S. Attorney's Office in 1984 in connection with its investigation into Joseph Topolosky's death; his name was not provided, however, because he "had never stated that he possessed any opinions that were exculpatory or arguably exculpatory in nature."

On February 26, 1986, counsel for defendant Messerlian conducted an oral deposition of Dr. Aronson. On the strength of the sworn statements taken at that time, defendants Messerlian and Wolkowski moved for a judgment of acquittal, or in the alternative for a new

trial, or for a hearing to determine whether there had been a violation of the rule of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). They argued that the statements of Dr. Aronson reveal the failure of the prosecution to turn over exculpatory information in violation of *Brady*, or that the opinions of Dr. Aronson constitute new evidence of a magnitude sufficient to warrant a new trial pursuant to FED.R. CRIM.P. 33. The United States responded with the affidavits of Assistant United States Attorney Anne Singer and former Assistant United States Attorney Robert Fettweis. These affidavits appear to contradict Dr. Aronson's assertion that he offered an exculpatory opinion to Ms. Singer. The United States argued that Dr. Aronson's statement in this regard

was incredible, or in the alternative that any information provided was not material to the issues involved in the trial. It therefore argued that defendants' motion should be denied.

On March 6, 1986, we determined that the deposition testimony of Dr. Aronson and the affidavits of Ms. Singer and Mr. Fettweiss raised genuine issues of material fact on the *Brady* issue, and we scheduled a hearing. *See United States v. Dansker*, 565 F.2d 1262, 1264 (3d Cir.1977), *cert. denied*, 434 U.S. 1052, 98 S.Ct. 905, 54 L.Ed.2d 805 (1978); *Government of the Virgin Islands v. Martinez*, 780 F.2d 302, 306-08 (3d Cir. 1985). On March 14, 1986, Dr.

Aronson and Ms. Singer testified at some length.[1]

A. Brady Violation

In *Brady*, the United States Supreme Court analyzed the duty of a prosecutor to disclose exculpatory information to a defendant. The Court determined that the Due Process Clause of the Fourteenth Amendment guarantees that a guilty conviction be based on a defendant's guilt, and not on gamesmanship or deception practiced by the prosecution. The Court noted that it had long been recognized that a prosecutor who "depriv[es] a defendant

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[1]Mr. Fettweis was made available, but we determined that his testimony would not significantly aid us in our determination of the matter. The United States agreed to rest on his affidavit; counsel for defendants did not call him as a witness or object to the court's decision that he not testify. (T228-230, hearing of March 14, 1986).

of liberty through a deliberate deception of the court and jury by the presentation of testimony known to be perjured," 373 U.S. at 86, 83 S.Ct. at 1196, *quoting Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 341, 79 L.Ed. 791 (1935), or who "allows [perjury] to go uncorrected when it appears," 373 U.S. at 87, 83 S.Ct. at 1196, *quoting Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959), violates the defendant's rights to due process. The Court extended this rule in *Brady* to

> hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.

373 U.S. at 87, 83 S.Ct. at 1196. The

prosecutor's duty to disclose was subsequently extended to situations in which either a general *Brady* request is made or no request is made. "[E]lementary fairness requires" that material exculpatory information in the possession of the prosecution be disclosed regardless of a failure of the defendant specifically to request it. *United States v. Agurs*, 427 U.S. 97, 110, 96 S.Ct. 2392, 2400, 49 L.Ed.2d 342 (1976).

Defendants argue that the evidence allegedly withheld is *Brady* material because it tends to demonstrate that Joseph Topolosky's death was caused not by blows, but by accidental means; they also argue, however, that the alleged failure to disclose goes beyond *Brady* in that it improperly limited the defendants' ability to confront adverse witnesses--specifically, the medical

experts proffered by the United States. (Defendants' Joint Brief, dated March 3, 1986, p. 4.) This apparent bifurcation of defendants' argument is unnecessary, however. The analysis of an allegation by a defendant that he has been denied the right to confront a hostile witness, *see Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), where the basis of the alleged denial is the prosecutor's non-disclosure of impeachment evidence, has been subsumed into the *Brady* analysis. In *United States v. Bagley*,--U.S.--, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Supreme Court stated that:

> impeachment evidence...as well as exculpatory evidence[] falls within the *Brady* rule. *See Giglio v. United States*, 405 U.S. 150, 154 [92 S.Ct. 763, 766, 31 L.Ed.2d 104] (1972). Such evidence is "evidence favorable to an accused," *Brady*, 373 U.S.,

> at 87 [83 S.Ct., at 1196], so that, if disclosed and used effectively, it may make the difference between conviction and acquittal.
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> . . .
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> The Court of Appeals treated impeachment evidence as constitutionally different from exculpatory evidence. According to that court, failure to disclose impeachment evidence is "even more egregious" than failure to disclose exculpatory evidence "because it threatens the defendant's right to confront adverse witnesses." *[Bagley v. Lumpkin]*, 719 F.2d [1462], at 1464.
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> . . .
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> This Court has rejected any such distinction between impeachment evidence and exculpatory evidence.

105 S.Ct. at 3380.

Bagley instructs us that the allegation of a failure to disclose information helpful to the defendant, whether that information is exculpatory

evidence or impeachment evidence, must be examined by reference to the same *Brady* standards.[2]

We address the record, then, to determine whether the United States failed to disclose material which,"in the context of the entire record ... creates a reasonable doubt that did not otherwise exist" as to the guilt of Messerlian and Wolkowski. *Agurs*, 427 U.S. at 112, 96 S.Ct. at 2402. The inquiry follows two steps: Initially, we must determine that there was a failure to disclose information known to the United States; if so, we must

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[2]For an informative discussion of the development of the *Brady* rule, and of the considerations relevant to the *Brady* analysis in various factual situations, *see United States v. Oxman*, 740 F.2d 1298, 1306-19 (3d Cir.1984) *vacated sub nom United States v. Pflaumer*,--U.S.--, 105 S.Ct.3550, 87 L.Ed.2d 673 (1985) *on remand United States v. Pflaumer*, 774 F.2d 1224 (3d Cir.1985).

determine whether that withheld information was *material* to the issues before the court. The Third Circuit has described the Supreme Court criteria for a finding of materiality as follows:

> "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." [*United States v. Bagley*, --U.S.] at ----, 105 S.Ct. at 3385 (opinion of Blackmun, J.), *see also id.* (opinion of White, J., concurring in part and concurring in judgment). Justice Blackmun's opinion further defined "a 'reasonable probability' as a 'a probability sufficient to undermine the outcome.'" *Id.* (*quoting Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984)).
>
> Although the Court in *Agurs* had distinguished the situations in which defendants had made no request for disclosure,

> had made a general request, or had made a specific request, the Court held in *Bagley* that the announced standard for materiality was "sufficiently flexible" to cover each of these situations. *Bagley*, --U.S. at ----, 105 S.Ct. at 3385.

United States v. Pflaumer, 774 F.2d 1224, 1226 (3d Cir. 1985). *See also, Government of the Virgin Islands v. Martinez, supra*, 780 F.2d at 306 (discussing *Bagley*); *United States v. Starusko*, 729 F.2d 256, 260 (3d Cir. 1984) (discussing impeachment evidence).

Much has been written about this "materiality" requirement; the battleground on which most *Brady* challenges are fought is that of the definition of materiality and the application of that definition to the

facts of a case.[3] In this case, both criteria of the *Brady* claim--non-disclosure and materiality--are disputed. Before we may address the materiality issue, then, we must consider whether, in fact, the United States improperly withheld information to which it had access. The *Brady*

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[3]In most reported cases, the non-disclosed evidence is recorded either in documents or otherwise, and the prosecutor's possession of it is not in dispute. For that reason, most reported cases dealing with the *Brady* issue do not discuss whether in fact there has been a failure to disclose, but rather move directly to the issue of materiality. *See e.g. United States v. Adams*, 759 F.2d 1099 (3d Cir. 1985); *United States v. Oxman*, 740 F.2d 1298 (3d Cir. 1984) *vacated and remanded sub nom United States v. Pflaumer*,--U.S.--, 105 S.Ct. 3550, 87 L.Ed.2d 673 (1985) *on remand* 774 F.2d 1224 (3d Cir. 1985); *United States v. Hsieh Hui Mei Chen*, 754 F.2d 817 (9th Cir. 1985) *cert. denied*, --U.S.--, 105 S.Ct. 2684, 86 L.Ed.2d 701 (1985); *Haber v. Wainright*, 756 F.2d 1520 (11th Cir. 1985); *Fitzpatrick v. Procunier*, 750 F.2d 473 (5th Cir. 1985); *Hickey v. Solem*, 728 F.2d 1149 (8th Cir. 1984); *but see, United States v. Provenzano*, 521 F. Supp. 403 (D.N.J. 1981). *aff'd* 681 F.2d 810 (3d Cir. 1982), *cert. denied*, 459 U.S. 861, 103 S.Ct. 136, 74 L.Ed.2d 116.

obligation arises from the prosecutors' dual role as advocate and "servant of the law." *Agurs*, 427 U.S. at 110,11, 96 S.Ct. at 2400-01. As the *Agurs* Court stated,

> the fact that [exculpatory] evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from some neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that the newly discovered evidence probably would have resulted in acquittal. If the standard applied to the usual motion for a new trial based on newly discovered evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.

427 U.S. at 111, 96 S.Ct. at 2401.

In his sworn statement, Dr. Aronson stated that Ms. Singer called him on or about March 6, 1984, to ask him to "review ... material [regarding the death of Joseph Topolosky] and form an opinion." (p. 6, deposition of Dr. Aronson of February 26, 1986). After he had reviewed the material,[4] he again, within one or two weeks, contacted her to discuss the case. At deposition, he stated that he informed Ms. Singer at the time of their second telephone conversation that he believed that the death "could be accounted for" by a fracture of the second cervical vertebra, producing a hemorrhage at the base of the brain. (*Id.* p. 8). He also

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[4]The letter sent by Ms. Singer to Dr. Aronson following this initial conversation was admitted into evidence at the March 14 hearing, and was marked DMW-2. That letter contains a list of the materials hwich Dr. Aronson agrees he received and reviewed.

remembered stating that he could rule out neither the possibility that the death was caused by a blow from a flashlight nor the possibility that the blow was caused by traffic accident preceding the arrest. (*Id.*) The transcript contains the following questions and answers at page 8:

Q. What was your final conclusion with regard to the allegation of the beating of the victim?

A. My final conclusion was that I did not believe that the victim in this case was beaten to death.

Q. Did you tell her [Singer] that on the phone?

A. Yes.

Dr. Aronson's statement of February 26 also contains references to

the effects of the particular hemorrhage he described; he stated that he told Ms. Singer that the hemorrhage could cause abnormal conduct, and that the abnormal conduct observed on the night of the victim's death "could be related to an injury sustained in the automobile accident." (*Id.* p.9). Although the testimony contained in this statement is somewhat tentative in places, it is clear that Dr. Aronson intended by his deposition testimony to convey his feeling that he had communicated a tentative opinion to Ms. Singer which was exculpatory in nature, and that he was not again contacted by any person connected with the prosecution, except for the payment of his bill, until he initiated such contact after the jury had returned a verdict.

Ms. Singer's affidavit of February 26, 1986, is in sharp conflict with this testimony. Paragraphs 7 and 8 of that affidavit which discuss Ms. Singer's recollections of her second (and last) conversation with Dr. Aronson, read as follows:

> 7. Dr. Aronson stated that, in his opinion, the medical evidence indicated that Topolosky had been struck by another person; he stated that he believed the force utilized was moderate and not severe; and he further outlined his opinions concerning the cause and manner of death which were similar to those previously rendered by Drs. Rudolph Platt, Robert Goode and Charles Hirsch.
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> 8. Dr. Aronson never stated to me that there was no evidence to support the conclusion that Topolosky had been struck by another person; he never stated to me that he disagreed with the conclusions of Drs. Platt, Goode and Hirsch that the manner of Topolosky's death was a homicide; and he also

> never stated to me that he believed that Topolosky's fatal injuries were sustained in the motor vehicle accident.

The affidavit of Robert Fettweis reveals no personal knowledge of the substance of the telephone conversations between Dr. Aronson and Ms. Singer.

We were faced, prior to the hearing, with a sharp conflict between Dr. Aronson and Ms. Singer on the threshold question of whether in fact the United States had been, prior to trial in possession of arguably exculpatory opinion testimony from Dr. Aronson. The testimony adduced at the hearing of March 14 only served to deepen the conflict, making it absolutely clear that either Dr. Aronson or

Ms. Singer, but not both, were testifying truthfully.[5]

At the hearing, Dr. Aronson testified that he told Ms. Singer that the cause of death, in his opinion, was a "Dimitri lesion,"[6] an injury to the

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[5]In many cases, counsel's proffer of testimony before a witness has been subjected to the adversary process is such that sharper factual disputes are anticipated than are produced. This is not such a case. We cannot, as factfinder, dismiss the disparity between Dr. Aronson's and Ms. Singer's recollection of events as the products of mistake or faded memory. They were both subjected to skillful and vigorous cross-examination, and both firmly maintained that they were certain that their versions of the content of their telephone conversations were the correct versions. Our observation of their demeanors while testifying, when coupled with their diametrically opposed testimony, compels us to conclude that one is lying.

[6]The designation of the hypothesized injury as a "Dimitri lesion" is apparently jargon peculiar to the Philadelphia Medical Examiner's Office. (Transcript of March 14 hearing, p. 27). The name is taken from the author of an article published in Vol. 16, No. 1 of the *Journal of Forensic Sciences*, p. 40 ff. (January 1971). This article was entered into evidence at the hearing, and bears the number DWM-7. The details of this category of injury are discussed further in Part I(B) of this opinion, *infra*.

vertebral artery at its passage through the first cervical vertebra (the "atlas"), which results in remote bleeding at the base of the brain. He further testified that the identification of the fatal injury as a Dimitri lesion could help explain the "abnormal activity" of the victim--a reference to the so-called "manic" behavior of Topolosky while he was in the rear seat of the troop car. (Transcript of March 14 hearing, p. 27, [hereinafter "HT"]). He stated that he communicated as his "primary opinion" the belief that the hemorrhage resulted from motor vehicle accident, and not from the beating. His (apparently secondary) opinion was that if the injury was not caused by the accident, "there was not a great deal of force used and it didn't constitute a beating under those circumstances."

(HT28). On direct examination, the following exchange took place:

Q. Doctor, let me ask you what your opinion was and is with regard to the manner of death of Mr. Topolosky?

A. In my opinion the manner of death is accident.

Q. Did you convey that to Anne Singer either in specific terms or by the nature of your conversation with her?

A. I may not have used the specific term but I know that I indicated to her my opinion was the injuries sustained were much more likely to have occurred as a result of the automobile accident than as a result of an injury by anyone else.

> This would make [sic] it in the classification of an accident.

(HT44). On cross-examination, Dr. Aronson reaffirmed that he had communicated to Ms. Singer his opinion that the motor vehicle accident caused the death (HT67), that if death was in fact caused by a blow, it was a blow of only moderate force (HT70), and that the nature of the hypothesized injury could explain the cause of Topolosky's observed abnormal behavior. (*Id.*)

On cross-examination he was questioned about a page of hand written notes which he had identified as a transposition of notes recorded contemporaneously with his review of the records and his second telephone conversation with Ms. Singer, and which had been entered into evidence bearing the

number DWM-5.[7] Dr. Aronson agreed that he had recorded nothing in these notes to reflect his transmittal to Ms. Singer of an opinion that the cause of death was accidental and that the manner of death was motor vehicle accident. (HT70).

Ms. Singer's testimony portrayed a different conversation. She

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[7]DWM-5 is a single sheet of lined yellow paper with hand written notes. Dr. Aronson testified that these notes were produced approximately one year ago when he discarded many of his files. He testified that he transcribed a "previously made note" made near the time of the second conversation. (HT31-32). The portion of DWM-5 which concerns the conversation with Ms. Singer reads as follows:

12:10-12:20 PM on 16 March 84
Conversation of Singer
Dx-"Dimitri" Lesion, may take time to develop. cw single blow c flat or sideways hand +/or flashlight to left side of neck to "get attention" and probably no justification for fed. prosecution.

recalls Dr. Aronson communicating "his conclusion that the death of Mr. Topolosky was caused by blows and that the degree of force was moderate." (HT120). She testified that she understood at that time that the medical evidence previously gathered identified the cause of death as a subarachnoid hematoma caused by blows from another person. (HT113). She recalls the "bottom line" of Dr. Aronson's oral opinion as being consistent with the existing medical evidence. (HT121). She testified that Dr. Aronson never told her that he believed that the death was caused by the motor vehicle accident. (HT121). She testified that he never discussed a Dimitri lesion with her, or the possibility that the subarachnoid hemorrhage was caused by a fracture of a cervical vertebra.

(HT122-23). She testified that he never told her that there was no evidence of a beating in this case, and said that she was certain of this fact because it would have been completely unexpected, and therefore very significant to the investigation. (HT124). On cross-examination she agreed that it is "possible" that Dr. Aronson discussed the motor vehicle accident and Mr. Topolosky's "thrashing about" in the back seat, but only in relation to certain "superficial injuries." (HT165-66). She also agreed that she retains--indeed that she had recorded--no notes of her conversations with Dr. Aronson. (HT161-63, 172). She testified that it was her usual practice to instruct medical experts not to prepare a written report unless and until she determined that such a report

was necessary (HT 125-26). She testified that she did not consider a report necessary because she considered Dr. Aronson's report duplicative of the reports she had previously reviewed. (HT121, 124, 172). She testified that she understood her *Brady* obligations, and that she would have treated an exculpatory opinion received from Dr. Aronson as such. (HT 125 (direct examination); HT172, 223-25 (cross-examination)).

We have had the opportunity to review Dr. Aronson's sworn statement and the affidavits of Ms. Singer and Mr. Fettweis; we have observed both Dr. Aronson and Ms. Singer testify at length on March 14, 1986; we have benefited from the oral argument presented in this matter on March 25, 1986. We now enter

findings of fact and conclusions of law.

FINDINGS OF FACT

1. In March of 1984 Assistant United States Attorney Anne Singer was engaged in the investigation into the circumstances of the death of Joseph Topolosky.

2. Ms. Singer had reviewed the reports and findings of several doctors in connection with this investigation, including those of Doctors Epstein, Platt, Lindenberg, Hirsch and Goode.

3. Ms. Singer, in March of 1984, contacted Dr. Aronson for the purpose of engaging him to review the record of the investigation. She sought his opinion both as to the cause of death and the degree of force applied in causing the injuries. She provided certain documents to Dr. Aronson to

provide him with a basis for his opinions.[8]

4. Dr. Aronson reviewed these materials, and contacted Ms. Singer approximately ten days after their initial telephone conversation to deliver to her a preliminary oral opinion.

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[8]I find that the materials received and reviewed by Dr. Aronson were those listed on Exhibit DWM-2, the cover letter sent by Ms. Singer with the materials, dated March 6, 1986. The materials are listed in the cover letter, and consist of reports of Doctors Platt, Epstein, Hirsch, Lindenberg and Goode (items a through d and f); an FBI interview of Dr. Goode (item e); transcripts of the testimony of Trooper McClelland and Doctors Goode and Platt before the Union County, New Jersey grand jury (items g through j); an accident report of Trooper Messerlian (item k); deposition testimony of Trooper Messerlian (item l); and a letter from the Union County Prosecutor to the Union County Assignment Judge requesting the dismissal of the indictment returned by the Union County grand jury (item m). The autopsy report (item a) was apparently not sent with the original package, but was sent a few days later.

5. The substance of the oral opinion which Dr. Aronson communicated to Ms. Singer was that the cause of death was a subarachnoid hemorrhage caused by blows of moderate force.

6. I find that Dr. Aronson did *not* tell Ms. Singer that he believed the cause of death to have been a Dimitri lesion, and that he did not discuss a fracture of the first (or second) cervical vertebra with her.

7. I find that Dr. Aronson did not discuss with Ms. Singer his theory that a leakage of blood caused by a Dimitri lesion could explain the "manic" behavior of Joseph Topolosky.

8. I find that Dr. Aronson did not tell Ms. Singer that he held the opinion that Joseph Topolosky's death was caused by the motor vehicle accident.

DISCUSSION

Both Dr. Aronson and Ms. Singer have extensive professional backgrounds and impressive credentials in their fields. We are firmly convinced by a review of the record, having had the opportunity to observe the courtroom appearance, manner and conduct of the witnesses, that Ms. Singer testified truthfully and Dr. Aronson did not. Although we base our determination to a significant degree on an assessment of intangible factors--tone of voice, manner of reacting to questions, responses to questions and attitudes displayed--we do not rely solely on that raw credibility assessment.

We have examined the progress of Dr. Aronson's description of his second conversation with Ms. Singer, from the notes which purport to reflect

his contemporaneous impressions, to his letter to his attorney dated January 31, 1986, and entered into evidence as DWM-9, to his sworn testimony on February 26, 1986, to his testimony before the court on March 14, 1986. We conclude that the enhancement of his recollection of transmitting exculpatory information at each stage calls into question the reliability of that recollection.

In his notes marked DWM-5, he mentioned a Dimitri lesion , and found the injury to be consistent with a "single blow" with a hand or a flash-light to "get attention." There is no mention of even the possibility that injuries sustained in the motor vehicle accident caused the death.

On January 31, 1986, he recalled that he told Ms. Singer that

here was no "beating,"[9] that the

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[9]Dr. Aronson apparently holds a rather idiosyncratic view of what constitutes a "beating." We questioned him when he was before us, and the following exchange took place:

> THE COURT: Why do you say you do not believe Mr. Topolosky was beaten?
> THE WITNESS: Because of the fact the injury which produced his death was primarily the injury behind his left ear which constitutes one blow. If in fact it was a blow or one impact, if it was an impact, and that [sic] the beating implies numerous types of blows, numerous injuries.
> THE COURT: How many?
> THE WITNESS: More than five or six.
> THE COURT: That would be your definition of a beating?
> THE WITNESS: I would begin to suspect a beating at that level and if more injuries were observed I might get to be more convinced the beating had taken place.
> THE COURT: If there was an [sic] evidence of three to four blows that would not be considered a beating by you?
> THE WITNESS: Not necessarily in a case where there had been an accident preceding where there might have been injuries sustained in that accident.

(Footnote continued on next page.)

"fatal blow was a single blow to the left side of the neck," and that there

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(Footnote continued from previous page.)

> THE COURT: I'm not talking about an accident now. I'm just trying to understand your definition of what is a beating.
> THE WITNESS: I would begin to use the term beating if I saw five or more blows in a given individual that were definitely the result of another person's action.

(Transcript of March 14, 1986 hearing, HT105-106). We find that the threshold set by Dr. Aronson at which a series of blows becomes a beating is not helpful in a case involving the alleged violation of 18 U.S.C. § 242. We find nothing in the case law which would allow this definition of a "beating" to be in any way relevant to a discussion of the guilt or innocence of Messerlian of the charge contained in Count I of the indictment that he did "wilfully assault, strike and beat Joseph P. Topolosky ... resulting in the death of Joseph P. Topolosky." Indeed, the testimony in this case was to the effect that the death resulted from a "beating" of three or four blows.

was a "possibility" that the injury to the left side of the neck was sustained in the motor vehicle accident.

On February 26, Dr. Aronson testified that the death "could be" accounted for by a fracture of the second[10] cervical vertebra causing a hemorrhage at the base of the brain. He stated that he told Ms. Singer that such an injury would produce abnormal behavior. He also stated that he told her that he "could not rule out the possibility that the injury was sustained by

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[10]In the transcript of the February 26, 1986 deposition, Dr. Aronson is quoted as referring to the Dimitri lesion as an injury to the *second* cervical vertebra; at the hearing on March 14, 1986, he referred to it as an injury to the *first* cervical vertebra. He explained this discrepancy by asserting that he had either misspoken on the previous occasion, or had been misquoted. At any rate, it is clear that what Dr. Aronson referred to at the March 14 hearing as a Dimitri lesion is in fact an injury to the first cervical vertebra (the "atlas"). (DWM-7, pp. 40-41).

being struck by a flashlight, I could also not rule out the injury being sustained in the automobile accident which preceded the arrest of the deceased in this case," and that his "final conclusion was that I did not believe that the victim in this case was beaten to death." (Deposition transcript of February 26, 1986, p. 8).

Prior to his testimony in this court, then, Dr. Aronson had stated that his recollection of his oral opinion delivered to Ms. Singer was that it was possible that the death was caused by a Dimitri lesion, that the injury could have been sustained either in the automobile accident or at the hands of Trooper Messerlian, and that he did not believe that Topolosky had been struck

by Messerlian more than four times.[11]

As we have described in more detail *supra*, Dr. Aronson's testimony at the hearing was to the effect that he had delivered to Ms. Singer a firm opinion that the cause of death was accidental. (HT44, 67). We are disturbed by this progression in Dr. Aronson's testimony. His recollection apparently moved in a steady fashion from a point where he had suggested possible alternative manners of death to the final point, at the hearing before this court, where he stated his final conclusion that the death should be classified as accidental, as having been caused by the motor vehicle accident.

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[11]*See* footnote 9, *supra*.

We are also concerned that Dr. Aronson's various formulations of his *present* opinion as to the manner and mechanism of death have undergone a similar progression.[12] In evaluating his credibility, we were influenced by this similar unexplained modification of his 1986 view of the manner and mechanism of death from a "possibility" on January 31 that death resulted from injuries sustained in the motor vehicle accident (*see* DWM-9) to a reasonable degree of medical certainty on March 14, 1986 (HT85), notwithstanding his inability to articulate a basis for this change in position, (HT91).

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[12]We will discuss the development of Dr. Aronson's opinion as to the manner and mechanism of death in Part I(B) *infra*.

Ms. Singer, on the other hand, appeared to testify truthfully. Her responses to questions were consistent, intelligent, and unambiguous. We have considered her failure to maintain any record of her conversation with Dr. Aronson, but we regard this as evidence of flawed recordkeeping (and perhaps professional judgment) rather than evidence of present lack of credibility. She testified on cross-examination, after persistent questioning, that she may have timed the preparation of expert's reports in civil cases in order to gain tactical advantage. (HT223-24). Defense counsel argued that she did so in this case, either in ignorance of her obligations under *Brady*, or in intentional disregard thereof.

They argued that Ms. Singer "buried" the opinion of Dr. Aronson with the aim of preventing defendants from obtaining favorable expert testimony. They argued that this theory is not inconsistent with the fact that this prosecution was ultimately undertaken pursuant to a decision by the Civil Rights Division of the U.S. Department of Justice, and not the United States Attorney's Office for the District of New Jersey. They argue that the common bonds of prosecutorial agencies would lead Ms. Singer to conceal the opinion of Dr. Aronson regardless of the identity of the prosecuting agency.

We considered the logic of this theory. We find, however, that it is improbable that it accurately describes

Ms. Singer's conduct in this case.[13] Our observations of Ms. Singer's demeanor on the witness stand and the unlikely nature of the defendants' theory of her misconduct have convinced us to credit Ms. Singer's testimony.

CONCLUSION OF LAW

We have found that the opinion transmitted to Ms. Singer by Dr. Aronson

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[13]We came to this factual conflict with a presumption that both the Medical Examiner for the City of Philadelphia and an Assistant U.S. Attorney will testify truthfully. Demeanor evidence aside, we found Dr. Aronson's testimony incredible on the basis of the variable nature of his recollection, and on the internal illogic of his explanations. Ms. Singer's testimony was quite consistent. Cross-examination produced no demonstration of uncertainty or indication of prevarication.

In this case we also find it unlikely that even an unethical attorney would "bury" an exculpatory opinion from Dr. Aronson. The effect of such an improper course of conduct would be to jeopardize the prosecution, as it is well within the realm of possibility that New Jersey defense counsel would approach the Medical Examiner for the City of Philadelphia for a medical opinion during the course of the trial.

was that Joseph Topolosky's death was caused by blows from another person administered with moderate force. We have been presented with no argument by which such an opinion could be construed as exculpatory, or as providing ammunition for the impeachment of medical experts.[14] The *Brady* doctrine does not require the United States to "make a complete and detailed accounting to the defense of all police investigatory work

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[14]Counsel for defendant Messerlian appeared to suggest at the hearing on March 14 that it could have been a *Brady* violation for the United States to have failed to turn over the opinion of Dr. Aronson that the degree of force of the blow to the back of the neck (if there was such a blow) was moderate. (HT199-200). This argument was not pressed. As Ms. Singer pointed out at the hearing, counsel for Messerlian was aware of expert testimony to this effect prior to the time of trial. At trial, counsel for Messerlian repeatedly stressed that it was his belief that the State prosecution was dismissed primarily due to the medical evidence that the degree of force was moderate.

on a case," *Agurs*, 427 U.S. at 109, 96 S.Ct. at 2400, *quoting Moore v. Illinois*, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972). We find that the United States did not possess the exculpatory evidence which was the subject of this motion prior to trial, and we therefore, without reaching the question of materiality,[15] find that there was no *Brady* violation.

B. New Trial

Defendants assert that the evidence now proffered by Dr. Aronson entitles them to a new trial pursuant to

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[15]Were we to reach this issue, we would hold that the information purportedly transmitted to Ms. Singer, had it been transmitted in turn to defendants, would probably not have resulted in a different outcome in this case. *See Pflaumer, supra*, 774 F.2d at 1226. The basis for this holding would largely track the discussion in Part I(B) *infra*, of the cumulative and unconvincing nature of Dr. Aronson's testimony.

FED.R.CRIM.P. 33. Our determination that the United States did not have possession of the evidence now offered by Dr. Aronson prior to trial is no impediment to the Rule 33 motion. Defendants argue that this evidence was not made available to the jury through no fault of the defendants, and that its consideration by the jury would lead to a judgment of acquittal.

Rule 33 allows this court to grant defendants a new trial "in the interest of justice." The guidelines adopted by the Third Circuit for assessing a motion for a new trial constitute a five-part test. To prevail on this motion, the defendants must establish the following:

1. The evidence was discovered since the trial;

2. The late emergence of the evidence is not due to a lack of diligence on the part of defendants;

3. The evidence is not merely cumulative or impeaching;

4. The evidence is material to the issues involved at trial; and

5. The evidence is of such a nature that it would probably produce an acquittal upon retrial.[16]

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[16]This test has been referred to as the "*Berry* rule," a reference to *Berry v. State*, 10 Ga. 511 (1851), the case to which these guidelines are traced. *See United States v. Johnson*, 327 U.S. 106, 110 n. 4, 66 S.Ct. 464, 466 n. 4, 90 L.Ed. 562 (1946). The Third Circuit borrowed its formulation of this rule from *Johnson v. United States*, 32 F.2d 127, 130 (8th Cir. 1929), *see United States v. Rutkin*, 208 F.2d 647, 649 (3d Cir. 1953); *United States v. Howell*, 240 F.2d 149, 159 (3d Cir. 1956); *United States v. Bertone*, 249

(Footnote continued on next page.)

The nature of the last three elements of this test is such that we must consider not merely the evidence and testimony adduced in connection with this motion, but also the relationship between this evidence and the evidence adduced during the trial. *See United States v. Herman*, 614 F.2d 369, 372 (3d Cir. 1980); *United States v. Johnson*, 713 F.2d 654, 661-62 (11th Cir. 1983), *cert. denied*, 465 U.S. 1081, 104 S. Ct. 1447, 79 L.Ed.2d 766 (1984); *3* Wright, *Federal Practice and Procedure*, ¶557, p. 337 (1982).

The new evidence offered by defendants in this case is the expert testimony of Dr. Aronson. There is no

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F.2d 156, 160 (3d Cir. 1957). Failure to establish any of these elements is fatal to a Rule 33 motion. *See United States v. Adams*, 759 F.2d 1099 (3d Cir. 1985); *United States v. Ianelli*, 528 F.2d 1290 (3d Cir. 1976).

question but that Dr. Aronson would be accepted in this court as an expert in the field of forensic pathology, and in fact he was accepted as such for purposes of the hearing on March 14, 1986. We must determine, in light of the extensive expert testimony previously presented to the jury, and in light of the nature of the "new" evidence offered, whether defendants have satisfied the five elements of the *Berry* rule as adopted in this Circuit.

As discussed *supra*, Dr. Aronson was supplied by Ms. Singer with certain materials related to the investigation of Joseph Topolosky's death. Dr. Aronson examined approximately 366 pages of documents and 57 photographs over a period of five hours in order to reach his tentative opinion. (HT60). Dr. Aronson was questioned at the hearing

with regard to whether he had studied the case further prior to the hearing in this court, and he identified no such further study. (HT90-91). At the hearing, he presented testimony as to the cause, manner and mechanism of Joseph Topolosky's death.[17]

When asked to identify the cause of death, he testified as follows:

> A. Death is due to a fracture of the lateral, the left lateral process of the atlas associated

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[17]The pathologists testifying in this case uniformly used the term "cause of death" to identify that disease or medical incident which resulted in death, *e.g.*, heart attack. They used the term "manner of death" to identify the category of means of death into which a particular case fits. There are five such categories: homicide, accident, suicide, natural and undetermined. (*See* trial testimony [hereinafter "TT"] of Dr. Rudolf Platt, vol. 22, pp. 4100-01). In discussing the particular means by which an individual injury came about, the doctors used the term "mechanism" of injury.

with a laceration of the vertebral artery producing intercranial bleeding [a "Dimitri" lesion].

Q. So that the cause of death would be a subarachnoid hematoma, is that correct?

A. The ultimate cause of death is the subarachnoid hemorrhage and I prefer the term hemorrhage although they are almost identical in meaning.

(HT63). In discussing the manner of death, Dr. Aronson testified that he had told Ms. Singer that "the injuries were sustained in the automobile accident." (HT30). When asked his present opinion as to the manner of death, he testified: "In my opinion the manner of death is accident." (HT44). He testified that he holds that opinion to a reasonable degree of medical certainty. (HT85).

Much of Dr. Aronson's testimony was concerned with his description of the nature of a Dimitri lesion. He described this lesion as the result of an impact to the first cervical vertebra (the "atlas") which results in its fracture. This fracture results in damage to the vertebral artery, which is a major conduit of blood to the brain and which passes through the transverse processes of the upper six vertebrae on its path to the brain. The damage to this artery is such, Dr. Aronson testified, that bleeding would not be detected at the site of the impact, but rather at a remote portion of the arterial system, where the walls of the blood vessels are much weaker.

He described the mechanics of the lesion as a rupture of the innermost of three layers of the vertebral artery

at the site of the impact, within the atlas. Blood then enters the interstices between the innermost layer of the artery and the middle layer. Blood then travels up this intersticial channel, accelerated by the pressure created by the impact, until it reaches that area of the brain where "the vertebral artery joins a circle of arteries called the circle of [W]illis." The walls of arteries, he testified, are much thinner within the skull than without; the combination of the increased pressure of the impact and the presence of this blood between layers of the arteries causes an artery to burst within the subarachnoid space.[18]

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[18]Dr. Aronson describes this mechanism throughout his testimony. It was described in detail at HT33-34 and 74-75. He referred to the article of his former colleague Dimitri Contostavlos, identified in footnote 6, *supra*, as a scholarly (Footnote continued on next page.)

On cross-examination, Dr. Aronson discussed the location of remote bleeding which is associated with a Dimitri lesion as he describes it. He stated that "a rupture takes place inside the brain--inside the skull in the circle of Willis." (HT74-75). He was asked to identify more precisely where such a rupture would take place. In so doing he identified an artery within the circle of Willis as the usual site for the rupture: the posterior communicating artery, which connects the posterior cerebral artery with the middle cerebral artery. All three of these arteries are within the network of

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source for this theory. The mechanisms of this lesion are discussed at pp. 43-45 of this article.

arteries known as the circle of Willis.[19]

Dr. Aronson agreed that this system of blood vessels had been examined by Dr. Hirsch, and that no rupture had been found, although an artifactual tear had been identified.[20] He also agreed that two autopsies had been performed, and that neither pathologist had identified a

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[19]The discussion is contained at HT74-76. During the course of this discussion, Dr. Aronson placed markings on a diagram of the blood vessels of the base of the brain, (G-15), graphically locating the site of the rupture.

[20]HT78. Dr. Hirsch testified at trial that his examination of the blood vessels at the base of the brain revealed only one incidence of damage. He removed this damaged blood vessel for further study. (TT, vol. 26, p. 4660). He testified that his microscopic examination of the injury to the vessel revealed that it was "artifactual"--that is, that it had occurred during the autopsy and was not in any way associated with the injuries causing the death of Joseph Topolosky. (TT, vol. 26, p. 4677).

fracture of the atlas.[21] He nevertheless maintained his opinion that death had been caused by fracture of the

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[21]Dr. Aronson referred directly during his testimony to the autopsy report of Dr. Platt (remarked for this hearing as DWM-6). At HT36 he acknowledged the following passage in the autopsy protocol:

> The cervical spine is uncovered of its soft tissues posteriorly and shows a small area of hemorrhage within the muscles, just to the left of the midline at the level of the first vertebra. It measures ¼". The transverse processes of the cervical vertebrae are uncovered of their soft tissues and an attempt is made to open the foramina to the vertebral arteries on both sides, posteriorly. In the process, no areas of hemorrhages are noted within the foramina. The cervical spine is removed posteriorly and no epidural or subdural hemorrhages are noted.

DMW-6, p.4. Dr. Aronson testified that this discussion betrays an "inexperienced attempt" to expose the area where the Dimitri lesion could have been located.

The "foramina" referred to by Dr. Platt is that transverse portion of the cervical vertebrae through which the vertebral artery passes. *See* DWM-7, pp. 41-42, figures 1 and 2.

atlas, which, in his opinion resulted in a fatal subarachnoid hemorrhage.

Dr. Aronson testified that he believed that the Dimitri lesion was caused by an impact suffered during the motor vehicle accident. He testified that the lesion is consistent with a blow of moderate force from a flash-light, but he expressed the opinion that it was suffered as a result of the motor vehicle accident, at which time, he theorized, Joseph Topolosky could have been propelled within the van in such a fashion that his atlas struck an unknown, hard object within the van, causing the fracture. He appears to suggest that he selected the motor vehicle accident as the mechanism for the injury rather than a blow because he believed that an injury suffered prior to the arrest would better explain

Topolosky's "mania" in the back seat of the troop car. (HT27-28; HT30-31). He agreed that an impact which would cause a fracture to the atlas would cause a visible sign on the surface of the skin; when asked to comment on the fact that neither Dr. Epstein nor Dr. Platt identified an external injury to the skin in the area over the atlas, he replied: "The hair of the deceased covers the area abundantly and it is my opinion neither of them looked at that place or shaved the hair." (HT79). He stated no basis for this opinion; he had expressed a lack of respect earlier for the work of Dr. Platt (*see, e.g.*, HT37), although he had not commented on the work of Dr. Epstein.

We have now heard Dr. Aronson's testimony explaining the nature of the evidence he would offer in a new trial

of these defendants. We have considered his testimony carefully; we have considered it, of course, in light of the extensive proceedings which have taken place in this matter. We have reviewed the transcripts of the trial testimony. We now set forth our findings of fact and conclusions of law.

FINDINGS OF FACT

1. This evidence is "newly discovered." The defendants had no access to Dr. Aronson during trial.

2. The failure of defendants to discover this evidence is not attributable to a lack of diligence on the part of defendants or any person associated with them.

3. The medical evidence at trial was uniform in identifying a

subarachnoid hematoma or hemorrhage as the cause of death.[22]

4. No evidence was introduced at trial regarding the possibility that death could have been caused by a lesion involving a fracture of the atlas and, ultimately, a fatal subarachnoid hemorrhage.

5. No medical expert testified at trial to an opinion, held to a reasonable degree of medical certainty, that the manner of death was accidental.[23]

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[22]*See* TT, vol. 35, pp. 6323-24 (Dr. Lindenberg); vol. 33, p. 5934 (Dr. Lukash); vol. 24, pp. 4399-400, and Exhibit G-49 (Dr. Platt); vol. 26, p. 4679 (Dr. Hirsch).

[23]The testimony at trial was to the effect that the manner of death was either homicide or undetermined. *See*, TT, vol. 35, pp. 6323-24 (Dr. Lindenberg: undetermined); vol. 33, p. 5934 (Dr. Lukash: undetermined); vol. 24, pp. 4399-400 (Dr. Platt: homicide); and vol. 26, p. 4681 (Dr. Hirsch: homicide).

6. At the hearing on March 14, 1986, Dr. Aronson identified the possible mechanisms resulting in a "Dimitri" lesion as either an impact resulting from the automobile accident (the mechanism which he believes, to a reasonable degree of medical certainty, resulted in the injury),[24] or a single blow from a second person (the mechanism which he regards as unlikely, but which he is unable to rule out).[25]

7. There was extensive testimony at trial that defendant Messerlian had struck Topolosky about the head and neck;[26] this testimony did not locate

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[24]HT30, 44, 85.

[25]HT28.

[26]The testimony of the civilian eyewitnesses was generally to the effect that they had seen defendant Messerlian enter the troop car and strike Topolosky several times. They had somewhat

(Footnote continued on next page.)

with any precision the site on the head and neck where the blows fell.

8. The possibility that a subarachnoid hemorrhage could be caused by a single impact to the head or neck was the subject of extensive testimony in this case.[27] To the extent that Dr. Aronson's testimony is intended to offer a new theory that death could have resulted from a single impact, it constitutes evidence that is merely cumulative.

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differing recollections; certainly none testified to the ability to state exactly where on Topolosky's body the blows landed. *See, e.g.*, TT, vol. 5, pp. 629-34 (Testimony of Abimael Fontanez); vol. 5, pp. 748-751 (Testimony of Gloria Ruiz); vol. 17, pp. 3136-42 (Testimony of Nelson Velasquez); and vol. 19, pp. 3445-48 (Testimony of Luis Guzman).

[27] *See, e.g.* TT, vol. 24, 4412 (Testimony of Dr. Platt).

9. The possibility that serious injuries to the head and neck could have resulted from the motor vehicle accident was the subject of extensive testimony from medical experts in this trial.[28] To the extent that Dr. Aronson's testimony is intended to offer a theory as to the manner of death, it constitutes merely cumulative evidence.

10. The medical testimony in this case was such that the jury was not offered an opinion of an expert as to which impact, identified with which injury, caused the subarachnoid hemorrhage and ultimately death.

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[28] *See, e.g.*, TT, vol. 35, pp. 6265-66, 6319, 6321, 6288-90, and vol. 36, pp. 6413, 6424 (Dr. Lindenberg); vol. 33, pp. 5933-34, 5989-92, 6000-02 (Dr. Lukash); vol. 24, pp. 4415-16, 4539-48 (Dr. Platt); vol. 26, p. 4682 (Dr. Hirsch); vol. 41, pp. 7184, 7227-28, 7274-76 (Dr. Sopher).

11. The medical evidence produced at trial was of death caused by one (or more) impacts or blows to the head or neck causing a subarachnoid hemorrhage and death. Dr. Aronson's description of a Dimitri lesion is entirely consistent with this description. The fact that he would hypothesize that this *particular* injury (as opposed to one described at trial) caused the subarachnoid hemorrhage is not material to the issues of the trial. In other words, it adds nothing material to the issues of the trial to hypothesize that an impact suffered in a motor vehicle accident or a blow from a flashlight caused a *Dimitri lesion* (as opposed to a fracture of the maxilla or a contusion to the side of the neck) and that death ensued.

12. Dr. Aronson offers no new *factual* evidence in this matter, but rather offers new expert opinion testimony based on the same factual evidence relied upon by the doctors who have previously testified.

13. Dr. Aronson's opinion that the fatal injury was a fracture of the first cervical vertebra is poorly supported by the factual record of this case in that:

a) It depends on the existence of a fracture of the first cervical vertebra, a fracture not found by either of the doctors who performed the autopsies on the body;[29]

b) It depends on the existence of a rupture of a blood vessel in the

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[29]*See* footnote 21, *supra*.

network of blood vessels known as the circle of Willis. Such a rupture was not observed by any doctor who actually examined the brain; Dr. Hirsch, who performed close examination of the brain, testified that no such rupture existed;[30] and

c) It depends on the existence of an injury to the surface of the skin over the first cervical vertebra, an injury which was not observed by either of the doctors who performed autopsies on the body.[31]

14. The testimony of Dr. Aronson, insofar as it discusses the effect of the seepage of blood into the subarachnoid space on the affect of an

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[30]*See* footnote 20, *supra*.

[31]*See* HT79.

injured person, is merely cumulative of other evidence in this trial.[32]

15. Were Dr. Aronson to testify before a petit jury in this matter, his credibility would be subject to question due to the nature of his prior statements, as we have discussed more fully in Part I(a) of this opinion. By this we mean to say that we believe that a jury would find that he had expressed, in 1984, an opinion substantially at variance with that he offers in 1986.

16. The testimony which Dr. Aronson offers is merely cumulative of that offered by the other medical experts who testified at trial.

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[32]*See e.g.*, TT, vol. 32, pp. 5821-23, vol. 34, pp. 6108-11, 6125-28 (Dr. Lukash); vol. 24, pp. 4402-03 (Dr. Platt); vol. 26. pp. 4658 (Dr. Hirsch).

17. The testimony which Dr. Aronson offers, if presented at a retrial of this matter, would be unlikely to produce an acquittal.

DISCUSSION

We have found that the testimony offered by Dr. Aronson would not alter a jury's assessment of the evidence in this case. We believe that these findings can be summarized in two statements: first, the evidence is, in essence, merely cumulative of that previously presented to the jury; and second, the hypothetical nature of the testimony--the failure to tie the academic theory to the facts of the

case--is such that a jury would be little persuaded by it.[33]

Defendants argue that the evidence is sufficient to entitle them to a new trial because Dr. Aronson testified to a reasonable degree of medical certainty that the manner of death was accidental--a conclusion new to the medical testimony of this case--and because he identified a new lesion which is consistent, in his opinion, with the evidence of this case.

We find the evidence cumulative, notwithstanding the new conclusion, because, absent the exotic name

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[33]Counsel for the United States argues that this connection is so speculative that the testimony is not even properly admissible. The connection between the theory of a "Dimitri" lesion and the death of Joseph Topolosky is attenuated; we are hesitant to rule at this time, however, that the testimony would be inadmissible at trial.

and complex description of the lesion advanced as the fatal injury, the testimony of Dr. Aronson discusses theories of the cause, manner and mechanism of death which were discussed throughout the trial.

The cause of death is universally agreed to be a subarachnoid hemorrhage. Dr. Aronson expressed the opinion that the manner of death is accident. He expressed the opinion that the mechanism of the fatal injury was an impact to the back of the neck after Topolosky had been propelled forward by the force of the vehicular accident. The jury in this case was presented with detailed testimony regarding the possibility that Topolosky could have suffered serious injuries to this head and/or neck as a result of the motor vehicle accident. There were, in fact,

several in-court demonstrations regarding the possible mechanisms of such injuries. The jury also heard medical testimony to the effect that a fatal subarachnoid hemorrhage could result from a single blow to the head or neck. They also heard testimony regarding the possibility that bleeding in the subarachnoid space could cause unusual, even violent behavior. We must find that one additional explanation for the mechanism by which Topolosky could have suffered a serious injury to his head or neck as a result of a motor vehicle accident is cumulative.

We would not grant a new trial on the basis of Dr. Aronson's testimony even if it were not cumulative. Although Dr. Aronson couches his opinion in terms of a reasonable degree of medical certainty, we believe that a

jury would regard it as little more than an educated guess. He was presented with reports and other evidence that the victim had been in a motor vehicle accident,[34] that eyewitnesses had reported that he had been beaten, perhaps with a flashlight, and that he had been pronounced dead a short time later. The medical reports indicated the presence of a large subarachnoid hemorrhage and several injuries to the head and neck. The reports also contained indications of violent behavior between the time of the motor vehicle accident and alleged beating. Dr. Aronson's review of this evidence

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[34]During trial, the prosecution adduced evidence that the accident was relatively minor, while the defendants adduced evidence that the accident was quite violent. We believe that the balance of this evidence heavily favored the prosecution's characterization.

brought to light no previously undiscovered injury or morphological finding.

Given essentially this evidence, Dr. Aronson identified the fatal injury as an obscure lesion which had been, in 1971, the subject of an article published in a scholarly journal and written by Dr. Aronson's former colleague. The mechanism for this lesion was identified by Dr. Aronson with the motor vehicle accident, although the injury was also consistent with a blow from a flashlight. The only apparent reason for Dr. Aronson's selection of the motor vehicle accident as the mechanism for producing the lesion is that this scenario would provide a neurological cuase for the apparently aggressive behavior displayed by Topolosky after his arrest.

The jury would have to consider this opinion in light of the other medical evidence presented. That evidence was such that it would be faced with the fact that three medical predicates for Dr. Aronson's opinion are not supported by the record; that is, the record does not indicate the presence of a fracture of the atlas, an injury to the skin over the atlas, or a rupture of a blood vessel in the circle of Willis. Although the transverse processes of the cervical vertebrae were examined at autopsy, no fracture of the atlas was detected; although a number of lesions of the neck and head were detected at autopsy, no lesion was detected over the atlas; and although the very blood vessels identified as those which rupture in the case of a Dimitri lesion were examined by other

pathologists, no rupture of any of these vessels was detected.

At a retrial of this matter, Dr. Aronson would be subject to cross-examination, as he was at the hearing on March 14. At that hearing, he was unable to provide a satisfactory explanation for the failure of his theory to locate a factual anchor in the evidence in this case.[35] He was also

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[35]Dr. Aronson relied heavily on his theory that Dr. Platt performed an unsatisfactory autopsy because "he didn't want to upset the undertakers." (HT37). He testified that he knew "from other material" at the time he formed his opinion that this was the case. (*Id.*) This other material is unidentified. Dr. Platt did testify at the trial that he had missed the fracture of the maxilla because he "didn't feel it was necessary to distort the body that much" (TT, vol. 23, p. 4244); Dr. Platt, of course, testified at this trial after Dr. Aronson had purportedly made his conclusions. These conclusions were made on the basis of the record supplied by Ms. Singer; Dr. Aronson testified that he has never spoken to Drs. Platt, Epstein or Hirsch about this case. (HT79). Dr. Aronson did not explain the basis for his opinion that (Footnote continued on next page.)

unable to provide a satisfactory explanation for the positive inconsistency between the medical predicates for his theory and the medical evidence presented at trial.

We believe that a jury would find Dr. Aronson's opinion to be too speculative and abstract to be of any real value in the truth-seeking process. It would have at its disposal the more substantially supported opinions of Drs. Lukash, Platt, Lindenberg and Hirsch, all of whom had developed a more fact-based medical opinion in this case following extensive examination of the

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(Footnote continued from previous page.)
Dr. Epstein *also* failed to detect the fracture of the atlas which Dr. Aronson assumes to have been present. It was, of course, Dr. Epstein who detected the fracture of the maxilla. (TT, vol. 23, pp. 4243-45; DWM-6, p. 6). We find Dr. Aronson's guess that these two doctors failed to detect a fracture of the atlas to be a very slender reed to support a motion for a new trial.

body of Joseph Topolosky and/or the records, reports and exhibits connected with the autopsies.[36]

CONCLUSIONS OF LAW

Having found that the defendants are unable to establish two of the elements of the *Berry* test--that the evidence is noncumulative and that it would probably result in an acquittal if introduced at a retrial--we must conclude that the motion for a new trial based on new evidence must be denied.

II. Inconsistent Verdicts

We now turn to the motion of

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[36]Dr. Aronson testified that he regarded his five hours of work spent in reviewing the record of Joseph Topolosky's death to be adequate preparation for testimony at trial and, obviously, for the formulation of an opinion to a reasonable degree of medical certainty as to the cause and manner of death. The four doctors mentioned above had obviously undertaken a much more extensive factual study of this case.

defendant Wolkowski for a judgment of acquittal or for a new trial on the basis of the assertedly inconsistent nature of the verdict. Wolkowski was found guilty on Count 2 of the Indictment, which charges all four defendants with conspiracy to obstruct justice in violation of 18 U.S.C. §1503, and he was found not guilty on Count 4 of the Indictment, which charges Wolkowski with making a false declaration to the grand jury in violation of 18 U.S.C. §1623. Defendants Mangione and Slattery were found not guilty of the conspiracy charge, and were also found not guilty of false swearing charges.

The key to Wolkowski's argument is that the "factual implications" of the verdict are such that there is insufficient evidence to sustain the

conviction on Count 2.[37] He argues that we must (or that we may) excise from the facts in this case those which the jury must have rejected in order to reach the not guilty verdicts. The remaining evidence, Wolkowski concludes, does not support the verdict of guilty as to Count II.

The government responds to this line of argument by attacking its

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[37]These factual implications are identified in Wolkowski's Brief and Appendix in Support of Motion for Judgment of Acquittal or, in the Alternative, for a New Trial, at pp. 5-6. They are:

1. That the jury found that Wolkowski, Mangione and Slattery testified *truthfully* that they had not been told on July 31, 1982 that the civilian witnesses had witnessed a beating;
2. That the jury found that there had been no conspiracy to discredit the testimony of the civilian eyewitnesses; and
3. That the conspiracy to obstruct justice which the jury found to exist was unconnected to the statement-taking process of July 31, 1982.

premises. It argues that the verdict does not require--indeed, does not *permit*--the court to disregard the evidence produced at trial to support the assertions contained in Overt Acts 3 and 6 of Count 2, which allege that Wolkowski "knowingly omitted" facts from a typed statement prepared following an interview of an eyewitness, and that he falsely swore that information regarding a beating was not related to him by the eye-witnesses.[38] In support of this

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[38]Overt Act 3 of Count 2 states:

On or about July 31, 1982, defendants HENRY F. WOLKOWSKI, GEORGE J. MANGIONE, and BRIAN J. SLATTERY interviewed three (3) of the eyewitnesses to the assault; thereafter the defendants typed statements for the witnesses to sign and knowingly omitted from the statements the fact that the witnesses had observed HARRY H. MESSERLIAN assault Joseph Topolosky.

Overt Act 6 of Count 2 states:

Defendants HARRY F. WOLKOWSKI (April 11, 1985), GEORGE J. MANGIONE (March 28, 1985), and BRIAN J. SLATTERY (April 4, 1985) made false material

(Footnote continued on next page.)

argument, the government relies on *United States v. Powell*, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 (December 10, 1984). In that case, the United States Supreme Court reaffirmed the rule of *Dunn v. United States*, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932). In *Dunn*, the Court was faced with a verdict by which a jury had found a defendant *guilty* of keeping liquor for the purpose of offering it for sale, but *not guilty* of possession, or of sale of the liquor. Although the verdict was logically irreconcilable, the Court found that it could not be attacked on that basis. It stated that:

(Footnote continued from previous page.)
declarations before a federal grant [sic] jury on the dates indicated after their names concerning their interviews on July 31, 1982 of the three (3) eye-witnesses to the assault, which testimony falsely stated, among other things, that the eyewitnesses did not report that they had observed HARRY H. MESSERLIAN assault Joseph P. Topolosky.

> Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment.
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> * * *
>
> "The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through leniency."

284 U.S. at 393, 52 S.Ct. at 190 (*quoting Steckler v. United States*, 7 F.2d 59, 60 (C.C.A.2d 1925)).

The Court in *Powell*, faced with a similarly inconsistent verdict, reaffirmed this view. It stated that criminal defendants may not benefit by an assumption that the not guilty verdict was correct while the guilty verdict was in error. It also rejected recourse to arguments going to the

reasoning of the jurors in reaching their inconsistent verdict.

> Such an individualized assessment of the reason for the inconsistency would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally would not undertake ... [W]ith few exceptions, once the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment.

105 S.Ct. at 478 (Citations omitted).

Wolkowski responds by arguing that *Powell* is simply not applicable to this case. He argues that his theory does not depend on the *inconsistent* nature of the verdicts, but rather utilizes the not guilty determinations to pare down the evidence by eliminating that which the jury must have rejected. Wolkowski argued that the prosecution is barred or estopped in some fashion from

relying, in opposing these post-trial motions, on evidence adduced at trial in support of the false swearing charges.[39] He argued that the jury had rejected the government's theory that Wolkowski, Mangione and Slattery conspired on the night of July 30 or the morning of July 31, 1982 to falsify the statements of the civilian eyewitnesses, and that it had also rejected the theory that these three defendants had continued this conspiracy through their testimony before the federal grand jury. He also argued that the evidence still available to the jury after it had rejected this portion of the case was

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[39]*See, e.g.*, Wolkowski's Brief and Appendix in Support of Motionfor a Judgment of Acquittal or, in the Alternative, for a New Trial, pp. 14-16; Transcript of post-trial motions, March 25, 1986, pp. 131-133.

insufficient to locate Wolkowski within a conspiracy to obstruct justice.

We find that this theory is nearly identical to that advanced before the Supreme Court in *Powell*, in which the defendant below argued that an acquittal on a predicate offense "necessitates a finding of insufficient evidence on a compound felony" based on that predicate felony. 105 S.Ct. at 478. The court found that this argument "falls of its own weight." *Id.* It is simply inconsistent with the reasoning of *Powell* to argue that we should gauge the sufficiency of the evidence supporting a conviction in this case only after we delete that evidence introduced in support of the overt acts which formed the basis of the substantive count of which Wolkowski was found not

guilty. The Court in *Powell* rejected this reasoning:

> [The] argument that an acquittal on a predicate offense necessitates a finding of insufficient evidence on the compound felony count simply misundertands the nature of the inconsistent verdict problem. Whether presented as an insufficient evidence argument, or as an argument that the acquittal on the predicate offense should collaterally estop the Government on the compound offense, the argument necessarily assumes that the acquittal on the predicate offense was proper--the one the jury "really meant." This, of course, is not necessarily correct; all we know is tht the verdicts are inconsistent. The Government could just as easily--and erroneously--argue that since the jury convicted on the compound offense the evidence on the predicate offense must have been sufficient.

105 S.Ct. at 478. In reaching its decision, the Supreme Court specifically disapproved of Circuit Court decisions

which had attempted to carve out exceptions to the *Dunn* rule. 105 S.Ct. at 475, discussing *United States v. Morales*, 677 F.2d 1 (1st Cir. 1982); *United States v. Hannah*, 584 F.2d 27 (3d Cir. 1978). We believe that the facts of this case fit squarely within the *Dunn/Powell* rule, and we therefore reject any argument premised on the adoption of the purported reasoning of the jury.

In his letter brief of March 5, 1986, Wolkowski appears to withdraw, to a large extent, from his reliance on the "inconsistent" nature of the verdicts for support of his Rule 29 and 33 motions. Rather, he cites the following language from *Powell* in support of his argument that this court should guard against irrational verdicts:

> [W]e note that a criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. This review should not be confused with the problems caused by inconsistent verdicts. Sufficiency of the evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt. *This review should be independent of the jury's determination that evidence on another count is insufficient.* The Government must convince the jury with its proof, and must also satisfy the courts that given this proof the jury could rationally have reached a verdict of guilt beyond a reasonable doubt. We do not believe that further safeguards against jury irrationality are necessary.

105 S.Ct. at 478 (citations omitted; emphasis added). We believe that *Powell* holds that we are precluded from considering the "factual implications" of the jury verdict in assessing either the

weight or the sufficiency of the evidence. We find, then, that the "inconsistent" nature of the verdicts does not inform our decision. The "inconsistent verdicts" argument having been rejected, Wolkowski's motion for a new trial or for a judgment of acquittal is, like defendant Messerlian's, a renewal of motions made at the close of the Government's case.

III. Renewed Rule 29 and Rule 33 Motions

We now turn to the motions of defendants Messerlian and Wolkowski for judgments of acquittal or for new trials on bases unrelated either to the nature of the verdict of any evidence which came to light following the trial. Wolkowski argues that the evidence was insufficient to support the verdict as to Count 2. He also urges that the denial of his previous motions for a

severance of this trial from that of Messerlian was a fatal error, and that the jury charge as to Count 2 was improper. He also contends that he should be granted a new trial on the basis of the weight of the evidence. Defendant Messerlian makes no new arguments in support of his renewed motion, but merely reincorporates those made previously. We first address Wolkowski's arguments.

In assessing Wolkowski's renewed Rule 29 motion, we must determine "whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt." *Powell*, 105 S.Ct. at 478; *see United States v. Lowell*, 490 F.Supp. 897, 901 (D.N.J. 1980) *aff'd* 649 F.2d 950 (3d Cir. 1981). He argues that the evidence is insufficient to support a finding

that a unitary conspiracy existed, that Wolkowski was a member of that conspiracy, and that the conspiracy had the goal of obstructing a federal proceeding. Much of the argument presented in support of this motion depends on our declining to consider, in deciding this motion, evidence adduced in support of Count 4 of the indictment. As we have held in Part II, *supra*, we are constrained by the *Dunn/Powell* rule to consider *all* of the evidence presented at trial; we will not interpret the jury's verdict as a finding as to, *e.g.*, the truthfulness of Wolkowski's testimony before the grand jury.

When at last we addressed this issue, we found that the evidence was sufficient to support the conspiracy Count. Relying on *United States v. Maker*, 751 F.2d 614 (3d Cir. 1984) and

United States v. Riccobene, 709 F.2d 214 (3d Cir. 1983), *cert. denied*, 464 U.S. 849, 104 S.Ct. 157, 78 L.Ed.2d 145, we found that the government had produced evidence sufficient for a rational juror to find a unitary conspiracy with the goal of preventing "disclosure of the events surrounding the alleged assault." (TT, vol. 29, p. 5080). We also found that there was evidence supporting the government's theory that the conspiracy aimed at preventing disclosure to "all comers," and that it continued to operate in such a manner so as to obstruct federal proceedings. We found that the holding of *United States v. Perlstein*, 126 F.2d 789 (3d Cir. 1942) is that this conspiracy, if proven to exist, runs afoul of 18 U.S.C. §1503. (TT, vol. 29, pp. 5080-81).

Wolkowski argues that the evidence is insufficient to connect him to any conspiracy to impede justice or protect Messerlian from prosecution. He argues that a fair assessment of the evidence compels the conclusion that the jury returned a guilty verdict against him based either on his close association with Messerlian or based on speculation or surmise. Either ground is, of course, improper. *United States v. Samuels*, 741 F.2d 570 (3d Cir. 1984); *United States v. Fitzharris*, 633 F.2d 416 (5th Cir. 1980). We have reexamined the evidence presented during the course of the trial. We reaffirm our finding that the evidence is sufficient to allow the jurors to find a unitary conspiracy, and that Wolkowski was a member. Given our finding that we must examine the entire record in connection with this

motion, and that we may not excise that portion which Wolkowski argues the jury "rejected," there is no need for recapitulation of the analysis supporting our prior denial of this motion. (*See* TT, vol. 29, pp. 5079-82a).

We now address Wolkowski's Rule 33 motion, pursuant to which we examine the weight, rather than the sufficiency of the evidence in order to determine whether a new trial is warranted. *See Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). We have examined the argument presented with respect to the jury charge on Count 2. We find that the charge is consistent with *United States v. Perlstein, supra*, which stands for the proposition that a conspiracy to obstruct justice, which at some point adopts the specific goal of obstructing a federal proceeding, may

properly be charged in an indictment against the members as a conspiracy to obstruct a federal proceeding.[40] We

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[40]It cannot be argued that the obstruction of the federal grand jury cannot be "fairly attributed" to Wolkowski. Overt Act 6 alleges, and evidence was introduced to prove, that Wolkowski gave false testimony before the federal grand jury. We find the discussion of § 1503 in *United States v. Moon*, 718 F.2d 1210 (2d Cir. 1983) inapposite to this case. In *Moon*, the Second Circuit held that a defendant's production of falsified documents to a grand jury pursuant to a subpoena was not in violation of § 1503, in part because the production was compelled, and no "corrupt" intent was shown. We similarly find unpersuasive the reference to *United States v. Brand*, 775 F.2d 1460 (11th Cir. 1985), in which the court reversed a conviction for obstruction of justice, ruling that the seeking out of testimony prior to trial, which testimony was never produced, does not constitute a violation of § 1503. In this case, evidence was presented which would allow a jury to find that Wolkowski engaged in concerted activity, including false statements before a federal grand jury, which was calculated corruptly to obstruct the investigation into the death of Joseph Topolosky. *See, e.g., United States v. Griffin*, 589 F.2d 200 (5th Cir. 1979) *cert. denied*, 444 U.S. 825, 100 S. Ct. 48, 62 L.Ed.2d 32. The evidence was sufficient to allow the jury to determine that Wolkowski took an active role in the alleged attempt to discredit the testimony of the civilian eyewitnesses. We find this evidence sufficient to support the verdict.

find that a jury could rationally find that the conspiracy existed, and that it continued to operate so as to attempt to obstruct a federal investigation; we believe that they were properly charged as to the elements of Count 2.

We similarly reaffirm our decision as to the severance motion. We recognize the seriousness of this argument; we continue to believe, however, the jury was able to compartmentalize the evidence and fairly analyze the guilt, or lack thereof, of each defendant. This belief has been buttressed by the nature of the jury's verdict, by which it returned findings of not guilty as to defendants Slattery and Mangione on counts nearly identical to those faced by Wolkowski. We reject Wolkowski's argument that he was in a position, with respect to severance,

significantly different from that of Mangione or Slattery.

Wolkowski argues that this case presents a "*Dansker* problem." *United States v. Dansker*, 537 F.2d 40 (3d Cir. 1976). He argues that the jury verdict calls into question what may be called the linchpin evidence of his membership in the conspiracy. We read *Dansker* and related cases (*see, e.g., United States v. Gallagher*, 576 F.2d 1028 (3d Cir. 1978) as holding that a new trial should be granted where proof of an essential element of a count has been struck as a matter of law. It should be evident at this point that we do not view the not guilty verdict as to Count 4 as the equivalent of a legal ruling striking Overt Acts 3 and 6 of Count 2 from the indictment. Viewed in light of *Powell*,

this case does not present a "*Dansker* issue."

The final argument presented by Wolkowski is an appeal to the conscience of the court. We appreciate the genuine spirit with which this request is made. We assure Mr. Wolkowski that we have approached this matter as one presenting grave issues--not the least of which are the potential penalties, whether imposed by this court or others--which have arisen as a result of the guilty verdict. Wolkowski has argued that we must review this Rule 33 motion as though we were sitting as a "thirteenth juror." We are familiar with this rhetorical description of the process; we wish to point out, however, that it is a misleading one. In weighing the evidence presented in this matter, we are permitted by the rule to grant a new trial

"in the interest of justice." As the rule has been interpreted, our discretion does not extend to the grant of a motion if the evidence were to fail to convince us of guilt beyond a reasonable doubt as it would if we were to sit as a juror. Rather, we are empowered to grant a new trial if we are convinced that the evidence is such that the verdict of the jury was not "rational," *Powell*, 105 S. Ct. at 477, or if the verdict is against the weight of the evidence.

We heard the testimony as it was admitted during the three months of this trial. We have examined and reexamined the evidence, in light of the demeanor and credibility of the witnesses, and we simply cannot in good conscience find that the decision was against the weight of the evidence.

Defendant Messerlian raises no new arguments or issues. The main thrust of Messerlian's pre-trial motions, as well as his motion for acquittal following the government's case, was that Count 1, which charges that he willfully deprived Joseph Topolosky of liberty without due process of law--by administering summary punishment--fails to charge a violation of federal law. We addressed these issues pre-trial and again at the close of the government's case. (*see* TT, vol. 29, pp. 5060-70). On the latter occasion we concluded that sufficient evidence had been adduced, both from eyewitness and expert testimony, to allow the jury to find a violation of 18 U.S.C. § 242. We have reviewed the record of this case, and we reaffirm that determination. Counseled primarily

by *United States v. Dise*, 763 F.2d 586 (3d Cir.1985), *cert. denied*, -- U.S. --, 106 S.Ct. 388, 88 L.Ed.2d 341 (1985) and *United States v. Delerme*, 457 F.2d 156 (3d Cir. 1972), we find that ample evidence was presented which would allow a rational juror to find that Messerlian's conduct constituted a criminal violation of Joseph Topolosky's civil rights. The court in *Dise* held that the intent element of § 242 is satisfied if a defendant "acted in reckless disregard of the law as he understood it," even if he was not thinking in constitutional terms. We find that the record amply supports the inference that Messerlian acted "intentionally" within the meaning of *Dise*. (*See*, TT, vol 29,pp. 5064-65). We reaffirm our prior analysis of the evidence presented during the course of

our denial of the Rule 29 motion at the close of the government's case. At that time we found that,

> the record allows a reasonable juror to conclude that, one, Messerlian administered the blows which have been described by the medical experts; and two, that he did so not for any legitimate police purpose, such as for the protection of persons or property, but rather for the purpose of administering punishment. We find that the evidence adduced in the government's case could allow the jury to find beyond a reasonable doubt that Messerlian administered "a physical beating as punishment for allegedly breaking the law [,acting] as prosecutor, judge, and jury." *United States v. Delerme*, 457 F.2d 156, 161 (3d Cir. 1972).

(TT, vol. 29, p. 5068). We reject the argument, for the reasons we have expressed on previous occasions, that there was a failure of proof either as to Messerlian's intent to deprive the victim of his rights, or as to the

nature of Messerlian's conduct as rising to the level of a constitutional violation.

For the reasons stated above, we deny Wolkowski's and Messerlian's renewed Rule 29 motions, and their motions for a new trial.

CONCLUSION

We find that all post-trial motions must be denied. The evidence presented was sufficient to support the verdict; we have weighed the evidence and we find that a new trial is not warranted. We have rejected the post-trial evidence of Dr. Aronson. We find that he did not testify truthfully when he claimed the United States Attorney's Office concealed exculpatory evidence, that the "new evidence" which he now offers is merely cumulative of that previously considered, and that it

would not affect the jury's verdict on retrial.

Implicit in these conclusions is the finding that Messerlian and Wolkowski received a fair trial. They were given considerable latitude in presenting evidence to the jury. Their cases were vigorously and intelligently presented by able counsel.

The evidence presented against the defendants, on the other hand, was substantial and compelling. We believe that the task left for the jurors after the completion of the presentation of evidence, was a difficult one. The length of their deliberations, the nature of their requests for information during those deliberations, and the nature of the verdicts leads to the conclusion that they intelligently and seriously examined the evidence and, as

is their proper function, made the difficult factual determinations.

We find that the jury verdicts were proper, appropriate and fully supported by the evidence. We recognize that the verdicts have unhappy implications for everyone within the criminal justice system. They bring into sharp focus abuses of power and authority by persons sworn to protect the public welfare. However, only if the criminal justice system polices itself can it maintain the respect of the society it seeks to serve.

Supreme Court, U.S.
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CLERK

(2)

No. 87-1191

In the Supreme Court of the United States

OCTOBER TERM, 1987

HARRY H. MESSERLIAN AND
HENRY F. WOLKOWSKI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
WM. BRADFORD REYNOLDS
Assistant Attorney General
JESSICA DUNSAY SILVER
LISA J. STARK
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury on the specific intent element of 18 U.S.C. 242.

2. Whether an oral opinion of a government medical expert that was not disclosed to petitioner until after trial constituted either exculpatory or newly-discovered evidence that entitled petitioner to a new trial.

3. Whether there was sufficient evidence to support the jury's verdict that petitioners had conspired to obstruct justice by agreeing to obstruct foreseeable federal grand jury proceedings.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1191

HARRY H. MESSERLIAN AND
HENRY F. WOLKOWSKI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-96a) is reported at 832 F.2d 778. The opinion of the district court (Pet. App. 97a-206a) is reported at 633 F. Supp. 1493.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1987. Petitions for rehearing were denied on December 4, 1987 (Pet. App. 207a, 209a). The petition for a writ of certiorari was filed on January 14, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a three-month jury trial in the United States District Court for the District of New Jersey, petitioner

Messerlian was convicted of depriving another of his civil rights, in violation of 18 U.S.C. 242; conspiring to obstruct justice, in violation of 18 U.S.C. 371; and making false declarations before a federal grand jury, in violation of 18 U.S.C. 1623. Petitioner Wolkowski was convicted of conspiracy to obstruct justice, in violation of 18 U.S.C. 371.[1] Petitioner Messerlian was sentenced to concurrent terms of ten years' imprisonment on the civil rights count, three years' imprisonment on the obstruction of justice count, and three years' imprisonment on the false declarations count. Wolkowski was sentenced to one year's imprisonment. Pet. App. 8a-9a.

1. This case arose from the death of an arrestee, Joseph Topolosky, while he was in police custody. The evidence at trial showed that on the evening of July 30, 1982, Topolosky parked his van in the left lane of the New Jersey Turnpike (Pet. App. 12a). A car carrying four persons collided with the rear of the van (*ibid.*). Three occupants of the car immediately went to the van and determined that Topolosky and his two children were not hurt (*id.* at 12a-13a).

Shortly thereafter, petitioner Messerlian, a New Jersey State Trooper, arrived with another trooper at the scene of the accident (Pet. App. 13a). They approached the van and, after awakening Topolosky and smelling alcohol on his breath, pulled him from the van, cuffed his hands behind his back, and escorted him to the police cruiser (*id.* at 13a-14a). While he was lying handcuffed alone in the back seat of the cruiser, Topolosky kicked out the car's left rear window (*id.* at 14a-15a). Messerlian responded by entering the cruiser and, according to witnesses who were only a few feet away, striking Topolosky three or four

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[1] Petitioner Wolkowski was found not guilty of the false declarations charge against him (Pet. App. 8a).

times on his face and neck with a heavy flashlight (*id.* at 15a). Afterwards, Topolosky lay motionless with blood running from his mouth and face (*id.* at 16a).

Several minutes later, Messerlian drove Topolosky back to the station. After seeing Topolosky's condition, a senior trooper called for an ambulance (Pet. App. 16a-17a). The victim was taken to the hospital, where he was pronounced dead on arrival (*id.* at 17a-18a).

Petitioner Wolkowski was the chief investigative officer at the police barracks at the time of the incident (Pet. App. 29a). Wolkowski interviewed Messerlian within minutes of Messerlian's arrival at the station, but Wolkowski made no written record of the conversation (*ibid.*). In addition, despite repeated requests, he refused to provide the hospital or the victim's family with any information about how Topolosky sustained his fatal injuries (*ibid.*). The next day Wolkowski supervised the taking of statements from eyewitnesses to the beating (*id.* at 30a-31a). Although each of the witnesses described Messerlian's beating of Topolosky, none of the interview reports mentioned the assault or the victim's physical condition (*id.* at 31a-32a). After the interviews, Wolkowski repeatedly told authorities that he had received no information about a beating, and he testifed before a federal grand jury that his interview report reflected all the information that he had obtained (*id.* at 33a).

Messerlian gave investigators contradictory accounts of the events on the turnpike (Pet. App. 35a-36a). Messerlian alternatively claimed that he never entered the cruiser, that he entered the cruiser only after the window was broken, and that he entered the cruiser before the window was broken when he saw Topolosky repeatedly banging his head against a briefcase and a radar unit that were located in the back seat (*id.* at 36a-37a). At trial, the government established that there was no briefcase or radar unit in

Messerlian's police car that night (*id.* at 38a). Messerlian also testified before a federal grand jury that he had not struck Topolosky (*ibid.*).

The attending physician in the emergency room, the medical examiner who performed the autopsy on the victim, and a forensic neuropathologist who examined the victim all testified for the government at trial. All three testified that Topolosky's death was a homicide that resulted from external blunt blows or impacts to the head and neck. They specifically ruled out the possibility that the fatality was due to natural causes, self-inflicted injuries, or the automobile accident. Pet. App. 18a-22a.

Petitioner Messerlian presented two medical experts who testified that Topolosky's death could have resulted from other causes, such as an aneurysm, the automobile accident, or self-inflicted blows that might have occurred if the victim had thrashed about in the back seat of the cruiser. One of the experts unequivocally stated that the fatal injuries could not have resulted from external blows from a flashlight, but the other stated that he could not rule out the possibility that those blows had fractured Topolosky's face. Pet. App. 24a-26a.

2. Following the jury's verdicts, petitioners filed motions for a new trial alleging, inter alia, that the government had failed to disclose the oral opinion of a medical expert who would have testified that Topolosky's fatal injuries were the result of the automobile accident. After holding a hearing at which the expert testified, the district court found that the government had not withheld any exculpatory information. The court found that the medical expert was not a credible witness and that he had lied under oath and had changed his opinion of the cause of the fatal injuries. Contrary to the expert's testimony, the court found that he had not told the government prior to trial that Topolosky's death had been caused by the

automobile accident; therefore, the court concluded, the government had not withheld any information that should have been disclosed under the principles of *Brady* v. *Maryland*, 373 U.S. 83 (1963). The court further found that the medical expert's current testimony regarding the cause of death was cumulative and would not have swayed the jury because both of the defense experts who testified at the trial had already stated that the victim could have sustained his fatal injuries in the automobile accident. Pet. App. 102a-103a, 131a-146a, 160a-178a.

3. On appeal, the court of appeals affirmed petitioners' convictions (Pet. App. 1a-96a). The court of appeals rejected (*id.* at 51a-59a) Messerlian's contention that the district court's instructions permitted the jury to convict merely upon a finding that he used excessive force or that he intended to strike the victim. According to the court (*id.* at 56a), the instructions as a whole "comport[ed] with the legal standard set forth in *Screws* [v. *United States*, 325 U.S. 91 (1945)]." The court further held (Pet. App. 60a-61a) that the district court correctly refused to instruct the jury that specific intent to inflict summary punishment is an element of the offense.

The court of appeals also rejected (Pet. App. 67a, 69a) petitioners' claim that the government failed to charge and to prove that petitioners intended to obstruct federal proceedings. The court noted (*id.* at 70a n.22) that the indictment charged and the government proved that petitioners "sought to 'prevent * * * law enforcement authorities of New Jersey and the United States,' from learning of the assault on Topolosky," and that the government properly relied on "overt acts designed to obstruct * * * both state and federal proceedings."

Finally, the court of appeals affirmed (Pet. App. 76a-84a) the district court's denial of petitioners' motion for a new trial based on the alleged failure of the govern-

ment to disclose an oral opinion of a medical expert witness. The court of appeals concluded (*id.* at 79a, 81a-82a, 84a) that the district court's findings—that the medical expert lied under oath and provided an opinion that was either "cumulative or incredible"—were "amply supported by the record." The court further concluded (*id.* at 83a-84a) that it did not need to determine whether Fed. R. Crim. P. 16(a)(1)(D) required disclosure of the expert's oral opinion because, in light of the cumulative and incredible nature of the testimony, the failure to disclose that opinion could not have prejudiced petitioners' substantial rights. Hence, in the court's view petitioners would not have been entitled to relief on that ground in any event.

ARGUMENT

1. Contrary to petitioner Messerlian's contention (Pet. 14-22), the district court's instructions did not permit the jury to convict him merely upon a showing that he used excessive force. As the court of appeals found (Pet. App. 56a-57a), "[t]he district court carefully defined for the jury the term 'willfulness' as requiring proof of an act 'done voluntarily and intentionally, and with the specific intent to do something [that] the law forbids.' * * * [T]he [instructions] did not permit the jurors to convict Messerlian solely on the basis of a conscious assault." They allowed the jury to convict "only if [it] found that Messerlian deprived Topolosky of a constitutional right and that Messerlian knew what he was doing was a violation of the law" (*id.* at 58a).

The court of appeals likewise correctly rejected petitioners' related contention (Pet. 18-19) that the district court erred in refusing to instruct the jury that Messerlian must have specifically intended to inflict summary punishment in order to violate 18 U.S.C. 242. As described in

Screws v. *United States*, 325 U.S. 91, 104 (1945) (plurality opinion), the only "specific intent required [by Section 242] is an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or [the] laws of the United States or by decisions interpreting them." The scope of the federal statute is not limited to the right to be free from summary punishment. It is well settled that a law enforcement officer's intentional use of unreasonable, unwarranted, or excessive force, in violation of a victim's Fourteenth Amendment due process rights, can supply the basis for a conviction under 18 U.S.C. 242. See, *e.g.*, *United States* v. *McQueeney*, 674 F.2d 109, 113-114 (1st Cir. 1982); *United States* v. *Stokes*, 506 F.2d 771, 775 (5th Cir. 1975); *United States* v. *Currie*, 609 F.2d 1193 (6th Cir. 1979), cert. denied, 445 U.S. 928 (1980); *United States* v. *Harrison*, 671 F.2d 1159, 1162 (8th Cir.), cert. denied, 459 U.S. 847 (1982); *United States* v. *Golden*, 671 F.2d 369, 370 (10th Cir.), cert. denied, 456 U.S. 919 (1982); see also *United States* v. *Dise*, 763 F.2d 586, 590-592 (3d Cir.), cert. denied, 474 U.S. 982 (1985); *United States* v. *Calhoun*, 726 F.2d 162 (4th Cir. 1984).[2]

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[2] Contrary to petitioner Messerlian's intimation (Pet. 21), the Fourth Circuit's decision in *Justice* v. *Dennis*, 834 F.2d 380 (1987) (en banc), does not conflict with the court of appeals' decision in this case. The court in *Justice* ruled that the district court had properly instructed a jury that was considering a pretrial detainee's claim under 42 U.S.C. 1983 that a police officer's behavior must "shock the conscience" (834 F.2d at 380). But the issue in *Justice* was the proper standard for determining what constitutes "excessive force"; that case did not concern the very different question regarding the proper jury instructions on the issue of specific intent. Hence, there is no conflict between the decision in this case and the Fourth Circuit's decision in *Justice*.

Finally, Messerlian claims (Pet. 17) that he could not have acted with the requisite specific intent because he was intending to subdue the victim in furtherance of a legitimate law enforcement purpose. Messerlian's contention wrongly assumes, however, that an intent to subdue is exclusive of an intent to use excessive force. That Messerlian was entitled and intended to subdue the victim does not mean that he necessarily lacked the intent to deprive the victim of his constitutional right to be free from excessive force by beating him in the head and neck with a flashlight.

2. Petitioners contend (Pet. 22-28) that the court of appeals erred in affirming the district court's denial of a new trial motion that was based on the testimony of a medical expert, Dr. Aronson, who purportedly would have testified that Topolosky sustained his fatal injuries in the automobile accident. As the court of appeals found (Pet. App. 81a), however, "the district court's findings of fact with regard to the credibility and reliability of Dr. Aronson's testimony are not clearly erroneous," but instead are "amply supported by the record" (*id.* at 82a).

Following a hearing at which Dr. Aronson testified, the district court concluded (Pet. App. 168a) that his testimony was "cumulative" because other medical experts had already presented "detailed testimony regarding the possibility that Topolosky could have suffered serious injuries to this [*sic*] head and/or neck as a result of the motor vehicle accident. There were, in fact, several in-court demonstrations regarding the possible mechanisms of such injuries" (*id.* at 171a-172a). The district court also concluded that Dr. Aronson's testimony, even if not cumulative, was not likely to produce an acquittal because it was inconsistent with the physical evidence in the case, was "little more than an educated guess" (*id.* at 173a; see also *id.* at 166a-168a, 174a-177a), and it would have been

undercut by rigorous cross-examination. Further review of these findings of fact, upheld by the court of appeals, is not warranted. See *Berenyi* v. *District Director*, 385 U.S. 630, 635-636 (1967).

There is likewise no merit to petitioners' claim (Pet. 26-28), raised for the first time in the court of appeals (Pet. App. 76a-77a), that they should have been granted a new trial on the ground that the government's failure to disclose the oral opinion of the medical expert violated Fed. R. Crim. P. 16. As the court of appeals concluded (Pet. App. 83a-84a), failure to disclose the expert's opinion could not have "prejudice[d] [the] substantial rights of [petitioners]" because it was either "cumulative or incredible." See *United States* v. *Young*, 470 U.S. 1, 17 n.14 (1985). Moreover, although the court of appeals did not reach the question, it correctly noted that "[t]he two [c]ourts of appeals that have addressed this issue have concluded that Rule 16(a)(1)(D) only requires disclosure of written reports" (Pet. App. 83a n.24). See *United States* v. *Shue*, 766 F.2d 1122, 1135 (7th Cir. 1985); *United States* v. *Glaze*, 643 F.2d 549, 552 (8th Cir. 1981).

3. Finally, petitioners contend (Pet. 28-31) that the court of appeals should not have relied on its own prior decision in *United States* v. *Perlstein*, 126 F.2d 789 (3d Cir.), cert. denied, 316 U.S. 678 (1942), to uphold their convictions for conspiracy to obstruct justice. Petitioners maintain that *Perlstein*, in which the defendants were convicted of conspiracy to obstruct justice in anticipation of federal proceedings, is inapplicable because the alleged conspiracy in this case was directed at a state investigation, not a federal judicial proceeding. But as the court of appeals found (Pet. App. 66a-75a), in both this case and *Perlstein* the indictments charged and the evidence demonstrated that the conspiracies were directed at impeding all investigations by any law enforcement agency,

whether associated with the State of New Jersey or the United States. Moreover, in this case, as in *Perlstein*, the conspiracy continued through the period that the federal investigation was pending. In fact, two of the overt acts charged in the conspiracy count involved false testimony by the two petitioners and others before the federal grand jury that was investigating this case (see *id.* at 28a). Thus, contrary to petitioners' contention, the conspiracy in the instant case was aimed at both federal and state proceedings, thereby making this case factually indistinguishable from *Perlstein*. In any event, the alleged intracircuit conflict upon which petitioners rely does not merit this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

JESSICA DUNSAY SILVER
LISA J. STARK
Attorneys

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